80-1514

Office-Supreme Court, U.S.
FILED
MAR 5 1981
ALEXANDER L. STEVAS,
CLERK

No. ....
IN THE

Supreme Court of the United States

October Term, 1980.

JOSEPH D. FONTENOT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Appeal from the United States Court of Appeals for the Fifth Circuit.

PETITION FOR A WRIT OF CERTIORARI.

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PETITION FOR A WRIT OF CERTIORARI.

The Petitioner respectfully petitions this Court for a Writ of Certiorari to review the final judgment and opinion of the United States Court of Appeals for the Fifth Circuit which affirmed a conviction in the United States District Court for the Northern District of Florida of violation of two (2) counts of Title 26, United States Code, Section 7206(1).

Questions Presented for Review.

This petition presents for review questions relating to the deprivation of the defendant/petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution in the following respects:

(1) Is an appellate court duty bound under the rule of *Cuyler v. Sullivan*, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) either:

(A) to permit the record to be supplemented to show an alleged actual conflict of interest which adversely affected the performance of legal counsel at trial;

(B) to stay the appellate proceedings and remand the matter to the United States District Court for the taking of evidence on an alleged actual conflict of interest which adversely affected the performance of legal counsel at trial; or

(C) to permit evidence to be presented en banc to show an alleged actual conflict of interest which adversely affected the performance of legal counsel at trial;

when the appellate court is properly notified by counsel for the defendant/petitioner immediately when it was discovered for the first time — after trial and after notice of appeal — that an alleged actual conflict of interest adversely affected the performance of the defendant/petitioner's legal counsel at trial?

(2) Was the trial court in error in unduly restricting defendant/petitioner's right to re-cross-examine the government's primary witness in order to elicit facts of bias, misconduct and perjury?

(3) Was defendant/petitioner deprived of his rights to effective assistance of counsel?

(4) Was defendant/petitioner denied a fair and impartial trial?

(5) Was defendant/petitioner properly advised of his rights as required by *Miranda v. Arizona* and other governmental regulations?

(6) Was defendant/petitioner convicted upon insufficient evidence derived from factual misinterpretations?

Parties to the Proceeding.

Petitioner: JOSEPH D. FONTENOT.

Respondent: UNITED STATES OF AMERICA.

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(B) To Stay the Appellate Proceedings and Remand the Matter to the United States District Court for the Taking of Evidence on an Alleged Actual Conflict of Interest Which Adversely Affected the Performance of Legal Counsel at Trial; or

(C) To Permit Evidence to Be Presented En Banc to Show an Alleged Actual Conflict of Interest Which Adversely Affected the Performance of Legal Counsel at Trial;

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Opinion Reference.

The opinion of the United States Court of Appeals for the Fifth Circuit entitled United States of America, Plaintiff-Appellee v. Joseph D. Fontenot, Defendant-Appellant, dated October 24, 1980, in Case No. 79-5512, is reprinted herein as Appendix A.

Jurisdiction.

The United States District Court for the Northern District of Florida had jurisdiction in this cause by virtue of Title 26, United States Code, Section 7206(1); Rule 18 of the Federal Rules of Criminal Procedure.

The United States Court of Appeals for the Fifth Circuit had jurisdiction under Title 28, United States Code, Sections 1291 and 1294(1).

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1) and Rule 19 of the Rules of the Supreme Court of the United States.

Constitutional Provisions and Statutes Involved.

Fifth Amendment to United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service and time of war or public danger; nor shall any person bc subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 18, United States Code, Sections 1961, 1962, and 1963 (as set out in the Appendix hereto).

Sixth Amendment to United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Title 26 United States Code, Section 7206(1):

> (1) *Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter: . . .*
>
> *. . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.*

Federal Rules of Evidence, Rule 611(b):

> . . . (b) Scope of cross-examination.—Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. . . .

Statement of the Case.

The defendant/petitioner was convicted of two counts of violation of Title 26, United States Code, Section 7206(1), by the United States District Court for the Northern District of Florida. The United States Court of Appeals for the Fifth Circuit affirmed the trial court conviction on October 24,

1980, and rendered its decision in *United States v. Fontenot*, 64 L.Ed.2d 333 (1980). See Appendix A. As a footnote (10) at the conclusion of the decision the Court stated as follows:

> 10. Appellant moved this Court to allow the record to be supplemented regarding the claim of a conflict of interest. *That motion was denied*. Our ruling today is limited to the record which was sent from the trial court. In no way do we express any view as to the impact the supplemental material might have had on this decision had it been properly before this Court or properly presented to the trial court. Neither do we express any view as to how the Supreme Court's recent decision in *Cuyler v. Sullivan*, ... U.S. .... , 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), relating to the appropriate standard for evaluating the effectiveness of counsel when there is a claim that counsel had a conflict of interest, might effect the decisions of this Court or the trial court at such time as evidence of a conflict is properly presented.

The Defendant/Petitioner alleged before the Appellate Court that he discovered subsequent to trial, and after notice of appeal, that his trial counsel and members of his firm were simultaneously representing interests in a probate matter adverse to him, to his present wife, and to his children by his first wife and that same adversely affected his performance due to an actual conflict.

The Defendant/Petitioner attempted to raise said conflict on appeal in conjunction with the issue of ineffectual representation of counsel and in that regard submitted a supplemental brief, excerpts of which are set forth as Appendix D.

Further, on or about August 3, 1980, Defendant/Petitioner filed a motion entitled Motion for Leave to Supple-

ment the Record on Appeal; Affidavit of Stephen R. Wolfson (including Exhibits A, B, C, D, and E), a copy of which motion is set forth as Appendix B. This motion was denied by order of the Appellate Court a copy of which is set forth as Appendix C.

Further, Defendant then filed a motion entitled Motion to Stay Further Appellate Proceedings on for Remand to the District Court for Leave to File a Motion for New Trial or in the Alternative to Set Aside Sentence, a copy of which is set forth as Appendix E. This motion was denied by the Appellate Court as reflected in the Court's Proceedings Docket which is set forth as Appendix F. Trial testimony was to the effect that Defendant/Petitioner owned and operated Playground Optical Co., Inc., a corporation whose business was the manufacture and sale of eyeglasses and hearing aids. The corporation had a store in Fort Walton Beach, Florida and one in Pensacola, Florida. The sales invoices for the Fort Walton Beach store, at which Defendant/Petitioner worked, were registered on two separate machines. The first machine was used each day until invoices totalling approximately two-hundred and twenty dollars had been recorded. At that point, all other invoices were recorded on the second machine.

The Defendant/Petitioner testified to the effect that only invoices recorded on the first machine were applied to the Fort Walton Beach store in order to save rent under the formula for rental amount in the lease and that invoices recorded on the second machine were applied to the Pensacola store in order to show more sales at such store so that a more favorable position in the shopping center could be obtained. The government contended that not all of the invoices from the second machine were included in tax returns filed by the Defendant/Petitioner.

The main government witness was Harry F. Williams, Jr., a former employee of Defendant/Petitioner. Among other things he testified that he kept or recovered from the trash invoices that were not recorded as his employment contract provided for commissions on total sales. On direct examination he responded in the negative when asked if he had received rewards from the government in exchange for his testimony. On cross-examination he responded in the negative when asked if he had received promises of immunity or an understanding that as a practical matter he would not be prosecuted. On redirect examination the government elicited the fact that he had been told that as a practical matter he would not be prosecuted. The trial court denied Defendant/Petitioner's request to re-cross-examine the witness.

Defendant/Petitioner's trial counsel requested statements for the first time under the Jencks Act, Title 18 U.S.C. Section 3500(a) approximately one-half way through the government's presentation of its case. Said request was not made until after three witnesses, including Harry F. Williams, Jr., had been excused and such statements were not in the possession of such trial counsel at the time of cross-examination of Mr. Williams, the government's prime witness. Trial transcript cover sheet, index, and excerpts of the transcript are set forth in Appendix G.

REASONS FOR GRANTING THE WRIT.

I.

Is an Appellate Court Duty Bound Under the Rule of Cuyler v. Sullivan, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) Either:

(A) To Permit the Record to Be Supplemented to Show an Alleged Actual Conflict of Interest Which Adversely Affected the Performance of Legal Counsel at Trial;

(B) To Stay the Appellate Proceedings and Remand the Matter to the United States District Court for the Taking of Evidence on an Alleged Actual Conflict of Interest Which Adversely Affected the Performance of Legal Counsel at Trial; or

(C) To Permit Evidence to Be Presented En Banc to Show an Alleged Actual Conflict of Interest Which Adversely Affected the Performance of Legal Counsel at Trial;

When the Appellate Court Is Properly Notified by Counsel for the Defendant/Petitioner Immediately When It Was Discovered for the First Time—After Trial and After Notice of Appeal—That an Alleged Actual Conflict of Interest Adversely Affected the Performance of the Defendant/Petitioner's Legal Counsel at Trial?

In the case at bar, the "Conflict of Interest" issue is directly related to this Court's recent decision in *Julius T. Cuyler, Superintendent, etc., et al., Petitioners v. John Sullivan*, 64 L.Ed.2d 333, which decided certain issues expressly reserved in *Holloway v. Arkansas*, 435 U.S. at 483-484. The *Cuyler* case held generally that state courts are not required to initiate inquiries into the propriety of multiple representation in every case unless the facts im-

posed a Sixth Amendment affirmative duty to so do. Such case, further, held that the possibility of conflict is insufficient to impugn a criminal conviction, and that in order to demonstrate a violation of Sixth Amendment rights when no objection was raised at trial, a defendant must establish that an actual conflict of interest adversely affected a lawyer's performance.

In the present case, the Defendant/Petitioner alleged that he discovered subsequent to trial, and after notice of appeal, that his trial counsel was simultaneously representing interests in a probate matter adverse to his, to adverse his present wife, and to adverse his children by his first wife and that the actual conflict adversely affected his trial lawyer's performance.

The Defendant/Petitioner attempted to raise the said conflict of interest issue on appeal in conjunction with the issue of ineffectual representation of counsel and in that regard submitted a motion for leave to supplement the record on appeal on or about July 22, 1980. Said motion was denied. A second motion, after Defendant obtained additional documentation, to supplement the file was filed on or about August 3, 1980. Said motion was also denied. Defendant then filed a Motion to Stay Further Appellate Proceedings and for remand to the District Court for Leave to File a Motion for New Trial or in the Alternative to Set Aside Sentence. Said motion was also denied. At every stage and in every way after the discovery of the actual conflict, defendant/petitioner attempted to and did bring the same to the attention of the Appellate Court but the court refused to consider the same. (See footnote (10) *infra*).

The United States Court of Appeals for the Fifth Circuit affirmed the trial court conviction on October 24, 1980, and rendered its decision in *United States v. Fontenot*, as a

footnote (10) at the conclusion of the decision the Court stated as follows:

> 10. Appellant moved this Court to allow the record to be supplemented regarding the claim of a conflict of interest. That motion was denied. Our ruling today is limited to the record which was sent from the trial court. In no way do we express any view as to the impact the supplemental material might have had on this decision had it been properly before this Court or properly presented to the trial court. Neither do we express any view as to how the Supreme Court's recent decision in *Cuyler v. Sullivan*, ... U.S. .... , 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), relating to the appropriate standard for evaluating the effectiveness of counsel when there is a claim that counsel had a conflict of interest, might effect the decisions of this Court or the trial court at such time as evidence of a conflict is properly presented.

In that the Court of Appeals denied the Defendant the chance to adduce evidence that may have satisfied the rule of *Cuyler v. Sullivan, supra*, Defendant has been as effectively denied his right to establish a Constitutional right as if same had occurred during the trial of his case. No good reason exists why an Appellate Court should show any less zeal to protect a Defendant's Constitutional rights than a trial court when the facts were not known at time of trial.

It is submitted that certiorari should be granted so that this Court may decide whether its decision in *Cuyler v. Sullivan, supra*, should be applied to an Appellate Court under the circumstances where a conflict is discovered after trial.

In failing to consider the issue of an actual conflict of interest adversely affecting the performance of defendant/petitioner's trial court counsel, the Appellate Court effec-

tively deprived him of his rights as guaranteed by the United States Constitution.

Further it is noted that in the *Cuyler* case this Court remanded the same for further proceedings relating to the issue of conflict of interest.

II.

Was the Trial Court in Error in Unduly Restricting Defendant/Petitioner's Right to Re-Cross-Examine the Government's Primary Witness in Order to Elicit Facts of Bias, Misconduct and Perjury?

With respect to the restriction on the re-cross-examination of Mr. Williams, the Court of Appeals in its opinion has stated that full and complete re-cross-examination is properly allowed when new matters are raised on redirect or, in the Court's discretion, it is determined necessary to a full and fair adjudication of the case. The Court of Appeals concluded that neither justification was present in the trial in the United States District Court. (See Appendix A.)

Defendant/Petitioner respectfully submits that the trial Court abused its discretion when it failed to consider the witnesses' credibility in denying counsel for the defendant/petitioner the right to re-cross-examine the government's prime witness. This issue was raised in Appellant's Opening and Supplemental Briefs:

> "(b) Scope of cross-examination.—cross-examination should be limited to the subject matter of the direct examination *and matters affecting the credibility of the witness*. The trial court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." (Federal Rules of Evidence, Rule 611(b), emphasis added.)

Since this rule would appear to sanction cross-examination and re-cross-examination on any matter relevant to the

witnesses' credibility, it would seem beyond dispute that a witness who has just changed his story on the witness stand, would be a prime area of inquiry. Appellant wishes to stress that these proceedings were before a jury, and once the inconsistency of the witnesses' testimony had occurred, defendant/petitioner was entitled to emphasize this fact. It was imperative that the defendant/petitioner, in order to fully develop his case, stress to the jury that this witness was not to be believed and that he was likely to testify according to what the government wished him to say. It is further notable that this witness was the prime government witness. Without the testimony of Mr. Williams, there would have been no case. Mr. Williams supplied a good deal of evidence in the form of invoices, his signature was on a great many of the invoices, and his testimony was essential in the proceedings. Appellant is not suggesting that the jury was not apprised of the fact that Williams was promised immunity. The appellant is contending that once this prime witness' testimony became contradictory, it was a miscarriage of justice and an abuse of discretion on the part of the trial court judge to limit defendant/petitioner's counsel to mentioning this occurrence only in argument to the jury, at the conclusion of the case.

The Court of Appeals' opinion cites the case of *United States v. Johnson*, 585 F.2d 119, 125 (5th Cir. 1978). As was stated in Appellant's Supplemental Brief, the *Johnson* case involved a situation where the evidence contained such a mass of detail that was so confusing, that further cross-examination would have been of no avail, thus the judge excluded it. Defendant/petitioner contends in the case at hand, that the entire case rested upon Williams' testimony, and the restriction of re-cross-examination of Williams was not justified by comparable considerations of complexity of the case or time constraints. The Court of Appeals'

opinion further cites the case of *United States v. Alonzo*, 571 F.2d 1384, 1387 (5th Cir.), *cert. denied*, 439 U.S. 847 (1978). Appellant also noted in his Supplemental Brief that the *Alonzo* case was significantly different than the case at hand. In *Alonzo* the judge disallowed further cross-examination of one Oddo because Oddo had already admitted to the jury he had agreed to cooperate with the government in exchange for leniency. Thus, *Alonzo* did not involve a government witness who first stated on the stand that he had not been given promises of leniency, and then later, changed his story on the stand and stated that he was given promises of leniency in exchange for testimony. Thus, in the case at hand additional re-cross-examination, unlike the cases cited in the Court's opinion, would have served the useful purpose and would have been consistent with the full and fair adjudication of the case with very minimal time considerations (defendant/petitioner submits that a few moments of re-cross-examination of the prime government witness very likely would have saved him a six month sentence). This Court is urged to reconsider the issue of whether the trial Court judge abused his discretion.

III.

Was Defendant/Petitioner Deprived of His Rights to Effective Assistance of Counsel?

In *MacKenna v. Ellis*, 230 F.2d 592, 599 (5th Cir. 1960), the right to counsel was interpreted as meaning the right to effective counsel. The *MacKenna* court stated:

> "We interpret effective counsel to mean not errorless counsel and not counsel judged in effective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance."

A review of the record in defendant/petitioner's case indicates that defense counsel prior to and during trial failed

to meet this standard. Crucial to any criminal defense is a thorough investigation and timely discovery, including finding out which witnesses the prosecution intends to call at trial, as well as the substance of the prosecution's case. Even in cases where there is seemingly evidence beyond a reasonable doubt as to guilt, or apparently no defense, effective assistance requires that the defense counsel seek out and develop any evidence or arguments in favor of his client. Courts have been particularly critical of attorneys who have failed to engage in adequate investigation. In *Powell v. State of Alabama*, 287 U.S. 45, 71, 53 S.Ct. 55, 77 L.Ed. 158 (1932) the court described such haphazard preparations in the following manner:

> "It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate . . . the record indicates that the appearance was rather pro forma rather than zealous and active . . . Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities."

Dissatisfaction with one's counsel in retrospect is not the same as the deprivation of right to counsel within the meaning of the due process clause. *Schlette v. People of the State of California*, 284 F.2d 827. However, while the Fourteenth Amendment does not require perfection in representation, "fatal mistake" in the context of "generally slovenly representation" was below the minimum required. *Stem v. Turner*, 370 F.2d 895.

In defendant/appellant's case, the defense counsel failed to protect defendant's interest not only at trial, but at the discovery stage as well. One crucial example is defense counsel's failure to properly and timely exercise the rights granted under the Jencks Act. Defendant/petitioner's counsel failed to request such statements until after the government's prime witness had been excused and another witness testified and therefore was not properly prepared for cross-examination. (See Appendix G).

Although defendant/petitioner's trial counsel stated that he had been talking to his client for some time, when the issue of whether defendant had been denied his *Miranda* rights arose, he stated:

> "If I had had any idea from talking to him that there had been a statement involuntarily given or no proper warning I'd have filed a motion to suppress."

If defense counsel had in fact discussed the events leading up to defendant's arrest carefully, he would have probably considered whether or not there was a problem involving *Miranda* rights.

There is also an absence of effective counsel where the representation is so lacking in competence that it becomes the duty of the court or prosecution to observe it and correct it. *Petition of Ernst*, 294 F.2d 556. Throughout the transcript of the trial, (the entire four volumes) there are instances of where the court acted before the defense counsel in that manner. In one instance during direct examination of a government witness by the prosecution, it was asked if said witness had advised defendant/petitioner of his constitutional rights. At that point, the court called defendant's attorney to the bench and stated that under the "new rules", when such a question arose, it was not done in front of the jury. Defense counsel should have known this and raised the proper objections.

Defense counsel also failed to adequately cross-examine certain witnesses and in particular the government's prime witness Harry F. Williams, Jr., in that he had no proper foundation therefore due to his failure to timely exercise his rights provided under the Jencks Act.

While defense counsel might not be expected to know as much about tax or accounting procedures as the attorney for the Internal Revenue Service, he had an obligation to either fill in these gaps in his knowledge or to associate experienced tax counsel. Defense counsel should also have hired an expert witnesses, an independent certified public accountant, which he did not do, since the prosecution had the benefit of certified public accountants and utilized their expertise. It is readily apparent from the record that the defendant's failure to introduce any written tabulations or charts to refute the Government Chart (Gov. Exhibit 47) placed the defendant at a disadvantage since his defense pointed to the inconclusiveness of the Government's Chart (See Section I herein). Moreover, an expert witness (C.P.A.) could have analyzed the evidence and prepared a gross profit percentage analysis over several years to show that the two years in question did not significantly differ from previous and succeeding years, thereby refuting the offenses as charged with a documented analysis based on actual figures in evidence.

Defense counsel exhibited a similar lack of thoroughness when, after the government had presented its case, defense counsel moved the court for a judgment of acquittal on the ground that the evidence was not sufficient for a jury to find beyond a reasonable doubt that defendant committed the offenses charged in the indictment. But when asked by the court if he wished to be heard on the motion, defense counsel stated no, which motion was then denied.

IV.

Did the Defendant/Petitioner Receive a Fair and Impartial Trial?

Conspicuously missing from the Court of Appeals' opinion is the issue properly raised by the defendant/petitioner that extremely inflammatory and prejudicial evidence, concerning his wife, was admitted into evidence during this jury trial, resulting in a violation of appellant's Fifth Amendment right to due process.

The most blatant and inflammatory aspect of this evidence consisted of a great deal of testimony throughout the trial concerning the defendant's wife, JOANN FONTENOT, and whether her receipt of gifts was from her father or her lover. (This issue is treated in full by the Court of Appeals for the Fifth Circuit in Appellant's Supplemental Brief, pages 4 through 6, and Appellant's Opening Brief, pages 39 and 40 of which we ask this Court to take judicial notice).

A corporate tax evasion issue could not conceivably give rise to relevance of such testimony, and it would be a rare juror indeed who could be uninfluenced by allegations amounting to incest and/or prostitution by the defendant's wife. The only comment made with this Court's opinion on this issue was footnote number 4 wherein this Court states the government properly raised these issues because proof of the falsity of defendant/petitioner's explanations is relevant to the question of willfulness of his conduct.

The defendant/petitioner submits that the government did not stop with trying to show any falsity in defendant/petitioner's explanations. The government was not content with the fact that the money had been received; the government continued to delve into such considerations as the motivation of the gift giver. This exposed to the jury, over proper objection, testimony of a highly inflammatory nature re-

garding the character of defendant's wife. The defendant/petitioner respectfully requests that this Court consider the impact that this testimony had on the jurors coupled with its irrelevance to the issues of this case. The government attempted to justify opening the door to this type of evidence on the basis of showing that defendant/petitioner standard of living *seemed* to exceed his reported income. This Court is urged to consider that this evidence was permitted without even requiring the government to establish: (1) what the standard of living of the defendant was; and (2) what that standard reasonably should have been; and (3) how a personal standard of living was relevant to corporate tax evasion.

V.

Was Defendant/Petitioner Properly Advised of His Rights as Required by Miranda v. Arizona?

Defendant/petitioner contends that the purported *Miranda* warning given by the Internal Revenue Agent was not properly proven in that the witness admitted that the card he was reading from on the stand was not the same as the one he read from at the time of questioning the defendant/petitioner and that he did not know for sure what differences there were.

The first interrogation of defendant/petitioner by the Internal Revenue Investigator took place at defendant's store. However, the fact that an interrogation takes place in familiar surroundings of a defendant's home or place of business rather than in a police station does not necessarily mean that the defendant is not being subjected to custodial interrogation, requiring *Miranda* warnings. The concept of custody has been broadly interpreted and is not limited to interrogations at a police station or prosecutor's office.

In *Brown v. Beto*, 468 F.2d 1284 (1972), certain criteria were mentioned as being determinative in making a distinction between custodial and non-custodial interrogation. The criteria included probable cause to arrest, the subjective intent of the police (or investigator), the subjective belief of the defendant and the focus of the investigation, with the most compelling factor being whether the focus of the investigation was on the defendant.

In *Chavez-Raya v. Immigration and Naturalization Service*, 519 F.2d 397 (1975), the court stated:

> "Application of Miranda does not turn on such a simple axis as whether or not the suspect is in custody when he is being questioned; rather, warnings are required if the individual is in custody or otherwise deprived of his freedom in any significant way."

Under the criteria listed in *Brown v. Beto, supra,* and *Chavez-Raya v. Immigration and Naturalization Service, supra,* defendant contends that the circumstances in his case mandated a compliance with the *Miranda* rule. Unlike mere fact-finding inquiries or on-the-scene questioning, which do not require *Miranda* warnings, in defendant's case, there had been a focus of the investigation on him which required him to be clearly informed of his right to remain silent, that anything he said could be used against him, that he had a right to a lawyer with him during interrogation and that if indigent, he would be provided a lawyer. Unless and until such warnings are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against defendant.

Recent decisions from the Seventh Circuit Court of Appeals have mandated that *Miranda* warnings be given when the taxpayer is interrogated by Intelligence Division agents of the Internal Revenue Service in surroundings where the practical compulsion to respond to questions about his tax

returns is comparable to the psychological pressures described in *Miranda*. *United States v. Dickerson* (1969), 413 F.2d 1111; *United States v. Oliver*, 505 F.2d 301.

While the fact of custody is emphasized in the *Miranda* opinion as having the practical consequence of compelling the accused to make disclosures, in *Oliver, supra*, the Court also indicated "that the test also differentiates between the questioning of a mere witness and the interrogation of an accused for the purpose of securing his conviction; the test serves the purpose of determining when the adversary process has begun." According to *Oliver*, a suspect should be advised of his rights when an investigation of the government is directed toward the ultimate conviction of a particular individual.

In the *Dickerson* case, the court ruled that the Internal Revenue Service, by assigning the matter to the Intelligence Division, had commenced the preparation of its criminal case. Agents in the *Dickerson* case questioned the defendant about his tax return without explaining their intentions. The court stated:

> "Incriminating statements elicited in reliance upon the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so must be regarded as equally violative of constitutional protection as a custodial confession extracted without proper warnings.
>
> "The practical effect of these misapprehensions during the questioning of a taxpayer was to 'compel' him to provide information that could be used to obtain his conviction in a criminal tax fraud proceeding, in much the same way that placing a suspect under physical restraint leads to psychological compulsion . . ."

The *Dickerson* court felt that these misapprehensions amounted to the deprivation of the suspect's "freedom of

action in any significant way'', which phrase was frequently mentioned in the *Miranda* opinion.

In the case at bar, a criminal investigation was launched which mandated that the *Miranda* warnings be given. The Appellate Court in deciding that the defendant/petitioner's freedom of movement was not restrained failed to consider the test set forth in the *Oliver, Dickerson* and *Brown v. Beto* cases.

VI.

Was Defendant/Petitioner Convicted Upon Insufficient Evidence Derived From Factual Misinterpretations?

The Court of Appeals states in its opinion,

> ''Several witnesses testified, and appellant admitted, that the corporate books reflected an invoice amount for the Pensacola store substantially less than that amount which would have been reflected had all invoices which were to have been 'transferred' actually been recorded. The record also indicates that the amount of income reported on the corporation's tax return was substantially less than the invoice amount after that amount was corrected to reflect the invoices not previously recorded. On that basis alone, the injury could have reasonably concluded that the appellant under-reported the corporation's income.'' Opinion, p. 601.

A. Before the Court of Appeals, the Defendant/Petitioner Submitted in Both Oral Argument and in His Briefs That ''Invoices'' Are Not Synonymous With the Amount of Income Actually Received.

Because a correlation has been made between invoices run on both machines and the total corporate income tax return, defendant/petitioner has attempted to clarify that invoices not only reflected accounts receivable, but included

some of which were never collected, some of these invoice amounts could have represented cash pocketed by Mr. Williams, the employee who was the government witness in chief. Indeed, this witness was granted immunity from being prosecuted for failure to report cash income.

Defendant/petitioner offered the following analysis to support his assertion that the difference between the invoice amounts and the amounts reported on the corporate tax returns could not possibly match up penny-to-penny with the government's conclusion.

> "With regard to the second set of invoices (which was not forwarded to Pensacola), Mr. Williams testified all of the checks were sent to Pensacola. The government witness who received and deposited the money at Pensacola testified he received not only checks, but cash as well and deposited the money. Defendant's accountant testified the reported amount on the income tax return matched up with the amounts deposited in the Ft. Walton and Pensacola accounts of the corporation. It was undisputed that all checks from the unreported invoices were deposited in the Pensacola accounts.
>
> Even taking the evidence in a light most favorable to the government, in conjecturing that defendant 'skimmed' the cash, the amount of this 'skimmed cash' could not possibly have equalled — to the penny — the amounts of the unrecorded invoices, because they included checks which were deposited. It is clear that the government has added the total amount of the omitted invoices as the amount that should have been added to the income tax report. Even taking Williams's testimony to be true, it is impossible for this amount to be their unreported amount and thus, the defendant has been convicted for failing to report a portion of his income twice." Appellant's Supplemental Brief, pages

3-4, submitted in the United States Court of Appeals for the Fifth Circuit.

This Court is being requested to consider that by virtue of the foregoing, a reasonable doubt as to the defendant/petitioner's guilt was present. Moreover, the alleged "skimmed cash" could just as easily have been taken by Mr. Williams. Additionally, appellant presented two plausible motives for using this method of accounting (1) to reduce the rent at his Ft. Walton store since that rent was based on gross income, and (2) to receive a better location for the Pensacola Mall store, as the locations were based upon gross income.

B. The Court of Appeals Also Stated That "Several Witnesses" Testified Regarding the Foregoing Issues.

The several witnesses include: (1) Mr. Williams, former employee of the defendant/petitioner. Mr. Williams stated that he was receiving immunity from the government for testifying and thus would not be prosecuted for his own tax evasion. It is notable that this witness first denied the existence of this arrangement and then, upon the prodding of the prosecution, admitted it. (2) Government agent Creel. (3) Government agent Stewart. (4) Fred Putnam, appellant's employee, also testified some of the invoices were not transferred to the Pensacola store. (5) Defendant/petitioner, himself, testified that the invoices reflecting the receipts on the second machine were not transferred to the Pensacola store. Although this Court states that several witnesses testified on this issue, appellant respectfully submits that three of those witnesses were assisting the government and the substance of their testimony did not present a basis upon which a jury could have found that an understatement of income occurred.

Defendant/petitioner submits that invoices were equated with income and he was convicted either because one of his employees was skimming cash, or because appellant failed to report a portion of his income twice. Defendant/petitioner is confident that a reconsideraton of the facts presented in this case will give rise to a reasonable doubt of his guilt.

Conclusion.

It is submitted that this case provides the Court with an ideal opportunity to expand on the rule of the *Cuyler* case (*supra*) as to the duty of an Appellate Court when an alleged conflict of interest adversely affecting the performance of a Defendant's legal counsel is discovered for the first time after trial and notice of appeal and brought to the attention of the Appellate Court.

For the above and the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM ZEUTZIUS,
STEPHEN R. WOLFSON,
ZEUTZIUS, LABRAN AND WOLFSON,
Counsel for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Fifth Circuit.

United States of America, Plaintiff-Appellee, v. Joseph D. Fontenot, Defendant-Appellant.

United States Court of Appeals, Fifth Circuit. No. 79-5512. Oct. 24, 1980.

Defendant was convicted in the United States District Court for the Northern District of Florida, Winston E. Arnow, Chief Judge, of willfully making false statements in connection with filing of tax returns, and he appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) evidence was sufficient to support conviction, and (2) defendant was not denied effective assistance of counsel.

Affirmed.

Appeal from the United States District Court for the Northern District of Florida.

Before RONEY, HILL and FAY, Circuit Judges.

FAY, Circuit Judge:

Appellant seeks reversal of his conviction for violating Section 7206(1) of the Internal Revenue Code, which makes it unlawful to willfully make false statements in connection with the filing of a tax return. Appellant was found guilty on two counts of violating this section, one count with respect to a 1972 corporate tax return and the other with respect to the 1973 tax return for that corporation. Appellant was sentenced to six months imprisonment on the first count and three years probation on the second count. We affirm.

Appellant owned and operated Playground Optical Co., Inc., a corporation whose business was the manufacture and sale of eyeglasses and hearing aids. The corporation had a store in Fort Walton Beach, Florida and one in Pensacola,

Florida. The sales invoices for the Fort Walton Beach store, at which appellant worked, were registered on two separate machines. The first machine was used each day until invoices totalling approximately two-hundred and twenty dollars had been recorded. At that point, all other invoices were recorded on the second machine. Only the money received with respect to the invoices from the first machine, however, were recorded on the corporation's books and deposited in the bank account of the Fort Walton Beach store. It is the disposition of the proceeds from the transactions recorded on the invoices from the second machine around which this case revolves. Appellant removed these invoices daily. A government witness, one of appellant's employees, testified that they were thrown in the trash, from which he removed them each day.[1] Appellant denied throwing the invoices away, asserting that they were kept in the store. Regardless, it is undisputed that some of the money received with respect to sales covered by those invoices was transferred for accounting purposes to the Pensacola store and recorded on the corporation's books as originating there. Appellant contends that all of the monies received with respect to those invoices were reported on the corporation's tax return. The government argues that only a portion of the proceeds from those invoices were transferred and reported; the remainder, in the form of cash, going unreported. The corporation's books reflect the total amount of the invoices for the Pensacola store, that is those which originated there and those

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[1]The reason Mr. Williams, the government's witness, removed the invoices from the trash each day is an integral part of this case. Apparently Mr. Williams could not convince Mr. Fontenot, the appellant, to give him a raise, at least not in the conventional sense. Rather, appellant offered to give Mr. Williams a 3% cash commission on all invoices from the second machine. Mr. Williams agreed to this but, concerned that he might be cheated, retrieved the invoices and kept them as a record of what he was owed.

which were transferred there from the Fort Walton Beach store, as a figure substantially less than it would have been had all of the second machine invoices from the Fort Walton Beach store been transferred and recorded as they were to have been. Simply put, the corporation's books did not reflect the full amount invoiced at both stores. By transferring the funds between the stores some was "lost."

On appeal, appellant asserts the following errors.

1. *Sufficiency of the Evidence*

Appellant contends that the government failed to establish a *prima facie* case and, therefore, it was error for the trial court to deny his motions for acquittal. We find no merit in this argument.

Appellant correctly points out that in order to establish its case the government must prove both falsity as to a material matter in the tax return and knowledge of such falsity by the accused at the time the return was signed. *United States v. Miller,* 545 F.2d 1204, 1212 (9th Cir. 1976), *cert. denied,* 430 U.S. 930, 97 S.Ct. 1549, 51 L.Ed.2d 774 (1977); *United States v. Cashio,* 420 F.2d 1132 (5th Cir.), *cert. denied,* 397 U.S. 1007, 90 S.Ct. 1234, 25 L.Ed.2d 420 (1970). The role of this Court is to determine whether the evidence, when viewed in a light most favorable to the government's position, *see Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), is such that the trier of fact could reasonably conclude that appellant was guilty beyond a reasonable doubt.[2] *United States v. Fox,* 613 F.2d 99, 101 (5th Cir. 1980). We hold that there was more than enough evidence from which the jury could reach that conclusion. Several witnesses tes-

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[2]The fact that we are considering the trial court's denial of appellant's motion for acquittal under Rule 29(a), Federal Rules of Criminal Procedure, rather than the substantiality of the evidence regarding the trial as a whole, is immaterial. The standards of review are substantially identical. *United States v. Figueroa-Paz,* 468 F.2d 1055, 1058 (9th Cir. 1972).

tified, and appellant admitted, that the corporate books reflected an invoice amount for the Pensacola store substantially less than that amount which would have been reflected had all invoices which were to have been "transferred" actually been recorded. The record also indicates that the amount of income reported on the corporation's tax return was substantially less than the invoice amount, after that amount was corrected to reflect the invoices not previously recorded. On that basis alone, the jury could have reasonably concluded that the appellant under-reported the corporation's income. The jury was not required to accept appellant's assertion that the total amount of money actually *received* was, for some unexplained reason, substantially less than the corrected invoice amount. There was also substantial evidence from which the jury could have concluded that appellant was aware of the falsity of the tax return when he signed it and that he did so willfully. Appellant admitted that the signature on the tax return was his. He admitted that he had reviewed the information contained therein before signing it. Moreover, the scheme for diverting funds from one store to another, with the unrecorded invoices as its central feature, was accomplished by appellant's own acts.[3] This is sufficient evidence that appellant acted will-

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[3]At trial, appellant offered an explanation to show that his motive for diverting the proceeds from the invoices of the second machine at the Fort Walton Beach store was other than tax evasion. Apparently, the rent due for the Fort Walton Beach store was determined by applying a formula, one of the main components of which was the total sales from that store. By diverting some of the proceeds from his sales to the Pensacola store, appellant argues that he was only trying to reduce his rent. In fact, appellant offered to make restitution to his landlord for the amount by which he was cheated. Appellant also offered to explain the transfer of funds as an effort to help the financially unstable Pensacola store. It was allegedly necessary to make that store appear to have greater revenues than it actually had in order to obtain a better location for the store in the shopping mall it was in. This relocation, in turn, would put the store back on the road to financial recovery.

It is apparent from the verdict that the jury either disbelieved these explanations or believed that tax evasion was an additional motive.

fully and knowingly when he filed the false tax return.[4]

2. *Abuse of Judicial Discretion*

Appellant presents a laundry list of complaints against rulings and remarks of the trial court, each of which it is asserted constitutes error. For the reasons set forth herein, we disagree. Appellant's most substantial complaint[5] is that the trial court unduly limited his right to recross-examine the government's chief witness, Mr. Harry Williams, Jr. Particularly, appellant asserts error in the trial court's refusal to allow the fact of inconsistent statements, as to promises made by the government regarding future prosecution of

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[4]Regarding the proof of the willfullness of his conduct, appellant contends that the government obfuscated the issue by attempting to portray him as a person whose standard of living was in excess of his regular income. Basically, appellant asserts that the jury found he had acted willfully solely on the basis of the government's insinuation that he was a bad person. In reality, however, appellant had attempted during the investigation to explain away certain sums of cash as representing gifts made to his wife by her purported father. The government raised the issue at trial, as it was entitled to do, because proof of the falsity of appellant's explanations is relevant to the question of the willfullness of his conduct. *United States v. Newman*, 468 F.2d 791, 794 (5th Cir. 1972), *cert denied*, 411 U.S. 905, 93 S.Ct. 1527, 36 L.Ed.2d 194 (1973). For that reason, as well as the fact that appellant will not be heard to object to the government's use of evidence regarding matters raised by appellant during the investigation, we reject appellant's contention that willfullness was not proved.

[5]Appellant also asserts the trial court erred (1) by commenting, in response to the government's objection to a defense question of the government's chief witness, that "This gentleman is not on trial here.", (2) by limiting appellant's cross-examination of Mr. Fred Putnam, another government witness, to the scope of direct examination, (3) by stating that defense counsel made an "unfair comment" when that counsel suggested the court was not treating both parties equally, and (4) by repeating an answer given by a witness when the same question was put to that witness. It is enough to say that the record does not support to even the slightest degree, these assertions that the conduct of the trial court was an abuse of its discretion or prejudicial to the defendant.

that witness, to be pointed out to the jury on recross-examination.

On direct examination the witness was asked if he had received rewards or promises of rewards from the government in exchange for his testimony. He responded in the negative. On cross-examination that witness was asked specifically, several different times, if he had received promises of immunity or an understanding that "as a practical matter you would not be prosecuted." Again he responded in the negative. On redirect examination the government elicited from the witness the fact that he had been told that as a practical matter he would not be prosecuted. At the end of redirect, the trial court denied appellant's request to recross-examine the witness for the purpose of pointing out the inconsistency in his statements. The court denied this request on the grounds that no new area of questioning had been raised on redirect that would justify such recross-examination, and that the inconsistent statements spoke for themselves without further discussion. We find no error in that ruling.

The conduct of a fair trial is vested within the sound discretion of the trial court, and it will not be reversed absent proof of abuse of that discretion. *United States v. Johnson*, 585 F.2d 119, 125 (5th Cir. 1978); *Wright v. Hartford Accident & Indemnity Co.*, 580 F.2d 809, 810 (5th Cir. 1978). While the presumption favors free cross-examination, *United States v. Alford*, 282 U.S. 687, 692, 51 S.Ct. 218, 219, 75 L.Ed. 624, 628 (1931), the purpose of recross-examination is more limited. It is properly allowed when new matters are raised on redirect or, in the court's discretion, it is determined to be necessary to a full and fair adjudication of the case. Neither justification was present here. The government simply elicited from the witness the truth as to the understanding it had with him re-

garding his prospects of later prosecution. Not only was it permissible for the government to do this, it was under an affirmative duty to correct the false statements made by its witness. *See, Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215, 218 (1962); *Mooney v. Holohan*, 294 U.S. 103, 112 55 S.Ct. 340, 341, 79 L.Ed. 791, 794 (1935). While the government could have brought this matter to the court's attention in several ways, it was quite proper to do so through redirect examination. Though the trial court could have allowed further examination by defense counsel, it was not an abuse of discretion to refuse to do so. *United States v. Alonzo*, 571 F.2d 1384, 1387 (5th Cir.), *cert. denied*, 439 U.S. 847, 99 S.Ct. 147, 58 L.Ed.2d 149 (1978). Finally, given the fact that defense counsel thoroughly discussed the inconsistent statements during closing argument, we conclude that appellant was not prejudiced by the trial court's refusal to allow recross-examination.

3. *Failure to Give Miranda Warnings*

Appellant asserts that the trial court erred by refusing to suppress certain statements and documents given by appellant to the Internal Revenue Service investigating agent when that agent failed to give appellant the full *Miranda* warnings. Appellant is incorrect. Internal Revenue Service agents are not required to give *Miranda* warnings in non-custodial interview situations.[6] *Beckwith v. United States*, 425 U.S. 341, 347, 96 S.Ct. 1612, 1616, 48 L.Ed.2d 1

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[6]The trial court found and the record clearly indicates that the agent conducting the interview in no way restrained appellant's freedom of movement nor compelled him to answer any question. The interview took place at appellant's store, a location in which he should have been comfortable and at ease. Moreover, the agent informed appellant that he was under no obligation to respond to questioning and was free to terminate the interview at any time. *See* note 7 *infra* for the text of the warning given to appellant.

(1976). Appellant's alternate assertion, that the evidence was inadmissible because the government failed to prove that the agent complied with the Internal Revenue Service's regulation requiring that *Miranda*-type warnings be given to people being investigated, is equally without merit. Appellant makes this argument on two grounds. First, that the court erred by not requiring the agent to produce the specific card from which the warnings were read to appellant and second, that the card containing the warnings was never offered into evidence by the government.

The first contention is easily dispensed with. Though it is true that the card admitted at trial was not verbatim identical to that from which the agent read appellant's rights, the difference was utterly without significance.[7] Moreover, we find no basis for requiring that an Internal Revenue Service agent produce at trial the specific card from which defendant's rights were read. The government need only prove, as it did here, that the statements made or documents provided were given voluntarily. *Beckwith v. United States*, 425 U.S. 341, 348, 96 S.Ct. 1612, 1617, 48 L.Ed.2d 1, 8 (1976).

The second assertion probably results from some confusion in appellant's brief, since any other interpretation is

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[7]The card which was admitted into evidence reads as follows:

> In connection with my investigation of your tax liability (or other matter) I would like to ask you some questions. However, first I advise you that under the 5th Amendment to the Constitution of the United States I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything you say and *any documents* you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of counsel before responding. (emphasis supplied)

The card which was admitted into evidence differs from that which was actually used during the investigation only in that the emphasized words "any documents" were replaced with the words "any information."

in blatant conflict with the record. Although the specific card used by the agent during his interview with appellant was not produced, the card (discussed in footnote 7) then being carried by the agent was received into evidence[8] quite properly.

4. *Ineffective Assistance of Counsel*

Appellant's final contention is that he is entitled to have his conviction reversed on the grounds that he was denied his Sixth Amendment and Fourteenth Amendment rights to effective counsel. For the following reasons we reject this contention. As the foundation for its assertion appellant points to the following:[9] (1) defense counsel's failure to assert the absence of *Miranda* warnings as a violation of appellant's constitutional rights; (2) defense counsel's failure to obtain certain *Jencks Act* statements from the government prior to the testimony of the witnesses who made

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[8]Record on Appeal, Vol. III. pp. 198-199.

[9]Appellant also offers a list of errors committed by counsel in preparation for and defense of the case, all of which allegedly rendered counsel ineffective. That list includes failure to adequately cross-examine all witnesses, failure to hire an expert witness, and failure to argue appellant's motion for acquittal. Based on the following analysis, we reject all of appellant's contentions that counsel was ineffective.

Defendants in a criminal prosecution are entitled to the assistance of counsel. Counsel need not have made what, in hind sight, might have been a wiser decision, but need only have provided reasonably effective assistance. *United States v. Childs*, 571 F.2d 315, 316 (5th Cir. 1978). Counsel's conduct of a trial must fall within a broad range of competence. Failure of counsel to provide such assistance denies a defendant of his Fourteenth Amendment due process rights.

This case is a direct appeal from a criminal conviction in a federal district court. Our review of the record indicates full compliance with that standard of competence required of defense counsel-reasonably effective assistance.

Additionally, we note that any suggestion in our prior decisions that a defendant has a higher burden of proof to establish the ineffectiveness of counsel when that counsel is retained rather than appointed, is erroneous in light of the Supreme Court's recent pronouncement on that point. *Cuyler v. Sullivan*, ____U.S. ____, ____, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333, 344 (1980).

those statements; and (3) a conflict of interest based on defense counsel's representation of an estate of which certain witnesses at trial were beneficiaries.

In light of our ruling that *Miranda* warnings were not required in this case, it was *a fortiori* not error for defense counsel not to strongly urge that the trial court suppress evidence on the basis that those warnings were not given. With respect to the *Jencks Act* statements, it is clear that defense counsel acted properly and, in fact, obtained those statements earlier than he was entitled to. Strictly applied, the defendant is statutorily authorized to demand copies of those statements only after the witness making them has testified on direct examination. 18 U.S.C. § 3500(a). In this case, defense counsel obtained the statements immediately prior to the witnesses' testimony. Clearly, counsel was not ineffective on that basis. Finally, appellant urges that counsel was rendered ineffective as a result of a conflict of interest arising out of the representation by his law firm of an estate, the possible beneficiaries of which include witnesses at the trial. Strictly on the basis of the limited information contained in the record before us on the question of a conflict, we conclude that the claim is without merit.[10]

AFFIRMED.

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[10]Appellant moved this Court to allow the record to be supplemented regarding the claim of a conflict of interest. That motion was denied. Our ruling today is limited to the record which was sent from the trial court. In no way do we express any view as to the impact the supplemental material might have had on this decision had it been properly before this Court or properly presented to the trial court. Neither do we express any view as to how the Supreme Court's recent decision in *Cuyler v. Sullivan*, ____U.S. ____, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), relating to the appropriate standard for evaluating the effectiveness of counsel when there is a claim that counsel had a conflict of interest, might effect the decisions of the Court or the trial court as such time as evidence of the conflict is properly presented.

APPENDIX B.

Motion for Leave to Supplement the Record on Appeal; Affidavit of Stephen R. Wolfson. (Including Exhibits A, B, C, D and E).

United States Court of Appeals for the Fifth Circuit.

United States of America, Plaintiff/Appellee, vs. Joseph D. Fontenot, Defendant/Appellant. Case No. 79-5512.

To: United States Court of Appeals for the Fifth Circuit:

Comes Now, Joseph D. Fontenot, Appellant in the above-captioned matter, by and through his counsel of record, Zeutzius, LaBran & Wolfson, who hereby moves this Honorable Court for leave to supplement the record on appeal by permitting submission of the following attached certified copies:

(1) Petition dated January 29, 1974 submitted by R.P. Warfield, Esquire on behalf of Mattie Sims to the Circuit Court of Okaloosa County, Florida, In Re the Estate of Coleman Kelly, Case No. 73-135.

(2) Notice of Hearing on a petition for the allowance of attorneys fees submitted on October 24, 1975 by R.P. Warfield to the Circuit Court for Okaloosa County, Florida.

(3) Motion for Continuance in the Case of Mattie M. Kelly, Plaintiff, vs. Coleman L. Kelly, Defendant, Case No. 72-3057 in the Circuit Court, Okaloosa County, Florida, filed November 22, 1972 by R.P. Warfield on behalf of Plaintiff.

(4) Election of Dower by Jeanne Kelly filed In Re the Estate of Coleman L. Kelly on February 25, 1974, showing copy furnished to R.P. Warfield, Esquire.

(5) Order admitting Coleman Kelly Will to Probate in the Circuit Court of Okaloosa County, Florida, showing conformed copy mailed to Richard Warfield, Esquire, on January 28, 1974.

This Motion is made under Rule 10(e) of the Federal Rules of Appellate Procedure and for good cause based on the following grounds:

(1) During the trial in the United States District Court, the defendant was represented by Mr. D.L. Middlebrooks who was his counsel of record at all stages of the proceedings until the within appeal.

(2) After the trial was completed, the defendant discovered that Mr. Middlebrooks' firm (Levin, Warfield, Middlebrooks, Mabie, Rosenbloum, et al.) was and had been during the trial, representing clients with interests adverse to those of the defendant, the defendant's children, and the defendant's wife.

(3) The conflict of interest is summarized as follows and is more fully discussed in the Appellant's Supplemental Brief filed with the Court herein:

During the trial, testimony was given regarding the relationship between defendant's wife, Joann Fontenot, and Coleman Kelly. (T.R. R-II, 120-139; R-III, 140-147; 229-250; 320-358). The nature of this testimony concerned Joann Fontenot's alleged relationship with Coleman Kelly — whether he was her natural father, or whether she was dating him, and extensive testimony was elicited to establish the motivation behind gifts from Coleman Kelly which were given to Joann Fontenot. One of the witnesses called was Phyllis Daniels, a grand niece of Coleman Kelly (T.R. III-239).

(4) Subsequent to the trial, defendant Fontenot became aware that R.P. Warfield of Mr. D.L. Middlebrooks' firm had been representing one or more of the heirs of Coleman Kelly at the time of trial. It was subsequently learned that R.P. Warfield, Esquire, was also representing Mattie Sims, the former wife of Coleman Kelly. Defendant had no knowledge of these facts during the trial.

(5) The fact of representation by Mr. Middlebrooks' firm of Mattie Sims, former wife of Coleman Kelly, presents a serious conflict of interest on the part of Mr. Middlebrook in that:

(a) Joann Fontenot testified she had been told she was a natural child of Coleman Kelly and thus has an interest in the Estate of Coleman Kelly.

(b) The ex-wife of defendant Fontenot had married Coleman Kelly and the four children of defendant Fontenot and his ex-wife have an interest in the Estate of Coleman Kelly.

(c) Mattie Sims has an adverse interest to defendant's wife, Joann Fontenot with regard to the Estate of Coleman Kelly in that Mattie Sims had alleged that certain funds in said Estate were actually co-mingled funds belonging to a trust, of which she was a beneficiary. For the same reasons as herein stated Mattie Sims also has an adverse interest to that of the children of defendant Fontenot and his first wife (who subsequently married Coleman Kelly).

(6) The defendant is raising the conflict of interest issue on appeal in conjunction with the issue of ineffective representation of counsel.

(7) Since the existence of said conflict of interest by virtue of Mr. Middlebrooks' firm's representation of Mattie Sims was unknown at trial, the present record on appeal is devoid of any information pursuant thereto except for a certified copy of an Order which was the subject of a previous motion to supplement the file.

(8) A certified copy of a petition dated January 29, 1974, submitted by R. P. Warfield, Esquire, on behalf of Mattie Sims to the Circuit Court of Okaloosa County, Florida, In Re: Estate of Coleman Kelly (Case NO. 73-135) is necessary as part of the record to enable the within Court

to be apprised of the existence of an improper conflict of interest on the part of the attorney for the defendant and to provide a factual basis pursuant thereto. A certified copy of said petition is attached herewith as Exhibit "A" and incorporated herein by reference. The following certified copies are also necessary for the same reasons as listed above to provide the within Court the factual basis for defendant's claim of a conflict of interest on the part of his attorney: Petition filed by R.P. Warfield on behalf of Mattie Sims In Re: Estate of Coleman L. Kelly in the Circuit Court of Okaloosa County, Florida and (attached herewith as Exhibit "B" and incorporated herein by reference); Motion for Continuance in the case of Mattie M. Kelly, Plaintiff, vs. Coleman L. Kelly, Defendant, in the Circuit Court of Okaloosa County, Florida, Case Number 72-3057, filed by R. P. Warfield on behalf of Mattie Kelly, on November 22, 1972 (attached herewith as Exhibit "C" and incorporated herein by reference); Certified copy of Election of Dower filed by Jeanne Kelly In Re: Estate of Coleman Kelly in the Circuit Court of Okaloosa County, Florida, showing R.P. Warfield, Esquire, as receiving copy (attached herewith as Exhibit "D" and incorporated herein by reference); Order admitting Will to probate In Re: Estate of Coleman Kelly on January 17, 1974, in the Circuit Court for Okaloosa County, Florida, showing conformed copy mailed to Richard Warfield, Esquire, (attached herewith as Exhibit "E" and incorporated herein by reference.).

(9) As the present record on appeal does not fully represent the proceedings below, the court is hereby requested to accept the aforementioned certified copies referring to Mr. Warfield of Mr. Middlebrooks' firm, so that the court on appeal may be presented with an accurate and complete record.

(10) The matter of the Probate Estate of Coleman Kelly was in progress for the duration of the defendant's trial and is still not completed as of this date due to the extremely large and complex nature of the case.

(11) Said request is being made pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure which provides that if anything material to either party is omitted from the record the court has the discretion on proper suggestion, to direct that a supplemental record be certified and transmitted.

DATED: This 12th day of August, 1980.

Respectfully submitted,

ZEUTZIUS, LABRAN & WOLFSON,
By STEPHEN R. WOLFSON,
Attorney for Appellant.

AFFIDAVIT OF STEPHEN R. WOLFSON

State of California, County of Los Angeles—ss.

1. That I am an attorney at law and associate of the law firm of ZEUTZIUS, LaBRAN & WOLFSON.

2. That I am admitted to practice before the United States Court of Appeals for the Fifth Circuit.

3. That I am counsel of record for the defendant/appellant in this appeal, but was not counsel of record during the trial.

4. That upon learning of the conflict of interest on the part of Mr. D.L. Middlebrooks' firm, my office contacted the Circuit Court of Okaloosa County, Florida, to ascertain if Mr. D.L. Middlebrooks' firm was involved in the probate estate of Coleman Kelly and upon learning that it was, requested the aforementioned certified copies showing Mr. Warfield of Levin, Warfield, Middlebrook, et al, as named on all of the aforementioned documents in the matter of the Probate Estate of Coleman Kelly.

5. The presence of conflict of interest on the part of Mr. D.L. Middlebrooks while he was counsel for the defendant in the trial herein presents a viable issue on appeal.

6. Said conflict of interest can be summarized as follows:

During the trial Joann Fontenot testified she had been told she was a natural child of Coleman Kelly. She therefore has an interest in the estate of Coleman Kelly. The ex-wife of defendant Fontenot had married Coleman Kelly and the four children of defendant Fontenot and his ex-wife also have an interest in the Estate of Coleman Kelly. The testimony elicited at trial from defendant's wife Joann Fontenot was directly and specifically concerned with interests adverse to Mr. Middlebrooks' firm's duties and obligations with regard to Mr. Warfield's representation of the ex-wife of

Coleman Kelly and her allegations that part of the estate of Coleman Kelly were co-mingled funds which were a part of a trust, and that she was beneficiary of that trust.

7. The aforementioned conflict of interest has been investigated and in addition to the previous motion made to supplement the record, the within motion is additionally necessary to permit augmentation of the record showing further evidence of a serious conflict of interest on the part of defendant's counsel during the time of the trial.

8. The within request for leave to supplement the record on appeal with the aforementioned certified copies of documents filed with the Circuit Court of Okaloosa County, Florida, is necessary to provide a factual basis upon which to properly support the issue of conflict of interest which is treated in Appellant's Supplemental Brief filed with the Court herein.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of August, 1980, Pasadena, California.

/s/ Stephen R. Wolfson
STEPHEN R. WOLFSON

State of California, County of Los Angeles—ss.

On August 12th, 1980, before, the undersigned, a Notary Public in and for said State, personally appeared STEPHEN R. WOLFSON, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

/s/ M. Antoinette Crawford
M. ANTOINETTE CRAWFORD
Notary Public

[Seal]

EXHIBIT A.

In the Circuit Court in and for Okaloosa County, Florida, Probate Division.

In re: Estate of Coleman L. Kelly, Deceased. Case No. 73-135.

PETITION

Your petitioner, MATTIE M. SIMS, by her undersigned attorneys, respectfully petitions this court as follows:

1. Petitioner is a natural person residing in Destin, Okaloosa County, Florida, and her post office address is P.O.Box 425, Destin, Florida.

2. She is the former wife of the decedent, Coleman L. Kelly, their marriage having been dissolved by Final Judgment of the Circuit Court of Okaloosa County, Florida in Case No. 70-5925, on June 25, 1971.

3. That pursuant to the Separation Agreement entered into between the petitioner and the decedent, which Separation Agreement was incorporated into the terms of the aforesaid Final Judgment of Divorce, petitioner was a beneficiary of the Trust created thereby and was also named as the successor Co-Trustee upon the death of the said Coleman L. Kelly. And pursuant to an interlocutory order entered by the Circuit Court of Okaloosa County, Florida in that certain suit wherein petitioner was plaintiff and Coleman L. Kelly, as Trustee, was defendant, the said petitioner was appointed as a Co-Trustee of the said Trust on September 4, 1973. A copy of the said Separation Agreement and interlocutory order are attached hereto and by reference made a part hereof.

4. The Trust Estate consists of vast holdings in real and personal property, including cash and certificates representing cash. Petitioner is informed, believes and therefore

alleges that prior to the death of decedent he did not maintain complete and proper records of his activities as Trustee and that some co-mingling of funds belonging to the Trust Estate with the decedent's purported personal funds took place. Therefore the petitioner, as beneficiary, under the terms of the aforesaid Trust has an interest in this Estate to the extent of such funds that might rightfully belong to the Trust may be entitled in the inventory of assets.

WHEREFORE, petitioner prays that this court will enter its order directing and requiring the decedent's personal representative, and all other interested persons or parties to serve upon her or her attorneys copies of all pleadings, inventories, appraisals and notices that may hereafter be filed in this cause.

* * *

State of Florida, County of Escambia

Before me, the undersigned authority, this day, personally came and appeared Mattie M. Sims, known to me and known to be the individual so described who, after being first duly sworn on oath, deposes and says she is petitioner herein and the matters and allegations herein contained are true and correct.

/s/ Mattie M. Sims
MATTIE M. SIMS

Sworn to and subscribed before me this 29th day of January, 1974.

/s/ [illegible]
NOTARY PUBLIC
My comm. exp.:1/27/75

CERTIFICATE OF SERVICE

I hereby certify that I furnished a copy of the foregoing petition by mail to Johnny Fortune, Esq., attorney for Valparaiso Bank & Trust Company, Post Office Drawer F, Fort

Walton Beach, Florida; David W. Palmer, Esq., attorney for L. Bernarr Kelly, Carol Kelly Adams and Cecelia Kelly Metz, 468 North Main Street, Crestview, Florida; David Selby, Esq., attorney for Imogene Kelly Toole, Post Office Drawer 1447, Fort Walton Beach, Florida; and James W. Middleton, Esq., attorney for Carnera Lee Kelly, Post Office Drawer 1767, Fort Walton Beach, Florida, this 29 day of January, 1974.

/s/ R.P. Warfield
R. P. WARFIELD
Levin, Warfield, Graff, Mabie & Rosenbloum
Seville Tower, 226 South Palafox Street
Pensacola, Florida
Attorneys for Mattie M. Sims

[Certified]

EXHIBIT B.

In the Circuit Court in and for Okaloosa County, Florida.

Mattie M. Kelly, Plaintiff, vs. The Valpariaso Bank & Trust Company, as Administrator C.T.A. of the Estate of Coleman L. Kelly, Deceased, Defendant. Case No. 70-5925.

Filed, Oct. 24 1975.

Notice of Hearing

To:
Johnny Fortune, Esquire
Estergren, Fortune, Anchors and Powell
P. O. Drawer F
Fort Walton Beach, Florida
Attorney for defendant herein.

And also to the following persons:
Walter J. Smith, Esq.
James W. Middleton, Esq.
David W. Palmer, Esq.
David L. Selby, Esq.
Virginia S. Barr, Esq.
Wilfred C. Varn, Esq.
Gregory M. Anchors, Esq.
J. LaDon Dewrell, Esq.
C. Roger Vinson, Esq.

And also to:
Fayette Dennison, CPA

You, and each of you, will please take notice that the undersigned attorneys will bring on for hearing before the Honorable Erwin Fleet, one of the judges of the above entitled court, in his offices in the Okaloosa County Annex Building in Fort Walton Beach, Florida, on the 25th day of November, 1975, at the hour of One Thirty O'Clock,

P.M., their petition for the allowance of attorneys fees for the services they heretofore rendered to the plaintiff, Mattie M. Kelly (Sims), in this cause of action.

You, and each of you, will please be governed accordingly.

/s/ R. P. Warfield
R. P. Warfield
Levin, Warfield, Middlebrooks, Graff,
Mabie, Rosenbloum & Magie
Seville Tower, 226 S. Palafox
Pensacola, Florida.
Attorneys for plaintiff

[Certified]

EXHIBIT C.

In the Circuit Court in and for Okaloosa County, Florida.

Mattie M. Kelly, Plaintiff, vs. Coleman L. Kelly, individually and as Trustee, Defendant. No. 72.3057.

Filed, Nov. 22, 1972.

MOTION FOR CONTINUANCE

The plaintiff, Mattie M. Kelly, by her undersigned attorneys, respectfully moves this Court to continue the trial of this cause of action now scheduled in Fort Walton Beach, Florida, on Tuesday, November 28, 1972 and as grounds for this motion says:

1. She has employed an accountant, one Benjamin A. Totten, Jr., to examine the books and records of the various and sundry business entities and operations comprising the entire trust estate.

2. That this accountant has spent many hours examining the books and records of said business entities and organizations and has consulted at length with the defendant's bookkeeper of many years, Mr. John Edwards of Pensacola, Florida. The sole purpose of the plaintiff's employment of this said accountant was so he could testify at the trial of this cause of action concerning the condition of the books and records and the manner in which the defendant, as trustee, and individually, had conducted, managed and operated the monies and properties which should have been put into the trust estate.

3. The plaintiff and her attorneys had a conference with the said accountant on Tuesday, November 21, 1972 in Fort Walton Beach in order to prepare for the trial of this cause of action. This was the first conference said attorneys had with said accountant inasmuch as it had taken him this length of time to prepare the books and records. During this con-

ference it was discovered that the said account will be in Tampa, Florida on November 26, 27 and 28 in connection with his duties as President of the Florida Accountants Association which is conducting a tax institute on those dates and the said accountant has a part of the program and will not be available on any of those dates to attend a trial of this cause of action. Attached hereto and my reference made a part hereof is a brochure reflecting these facts.

4. That in view of the complexity of his testimony and his necessity to refer to the books and records of the various business organizations and entities, the taking of his deposition, even if it could be scheduled and transcribed prior to the trial date, would be completely ineffective and virtually impossible to follow and comprehend.

5. The fact that the said accountant was not going to be available on November 28th was not known at the time the trial of this cause was scheduled for that date, and the plaintiff and her attorneys had no reason to know or believe he would not be available to testify. That this motion is made in good faith with no intention of unduly delaying the trial of this cause.

/s/ R. P. Warfield
R. P. WARFIELD
Levin, Warfield, Graff, Mabie &
Rosenbloum
250 Professional Building
Pensacola, Florida
Attorneys for Plaintiff

State of Florida County of Escambia

Before me, the undersigned authority, this day personally came and appeared R. P. Warfield, known to me and known to be the person so described who, after being first duly

sworn on oath, deposes and says that he is petitioner herein and the matters and allegations herein contained are true and correct.

/s/ R. P. Warfield
R. P. WARFIELD

Sworn to and subscribed before me this 21st day of November, 1972.

NOTARY PUBLIC
My commission expires: 1/27/75

CERTIFICATE OF SERVICE

I hereby certify that I furnished a copy of the foregoing motion for continuance to Walter J. Smith, Esq., attorney for defendant, by mail this 21st day of November, 1972.

/s/ R. P. Warfield
R. P. WARFIELD
Attorney for Plaintiff

[Certified]

EXHIBIT D.

In the Circuit Court in and for Okaloosa County, Florida,

In re: The Estate of Coleman L. Kelly, Deceased. PROBATE NO. 73-135.

ELECTION OF DOWER

Comes now Jeanne Kelly, widow of Coleman L. Kelly, deceased, and hereby elects to take dower in the estate of Coleman L. Kelly, which shall include one-third interest in all of the real and personal property owned by the decedent at the time of his death, including, but not limited to, the savings, real property, and assets of the Kelly Trust.

/s/ [illegible] (SEAL)
Jeanne Kelly

State of Florida County of Okaloosa,

BEFORE ME personally appeared Jeanne Kelly, who after being duly sworn, deposes and says that she has read the foregoing document and the statements and facts contained therein are true and correct and that she executed the same for the uses and purposes therein stated.

WITNESS my hand and official seal in the County and State aforesaid this 25th day of February, 1974.

/s/ Mary M. Holly
Notary Public
My commission expires:
NOV 26, 1976

WALTER J. SMITH
SMITH, GRIMSLEY, BARRON & REMINGTON
P. O. DRAWER LL
FORT WALTON BEACH, FLORIDA
ATTORNEY FOR PETITIONER, JEANNE KELLY

I HEREBY CERTIFY that on February 25, 1974,
Copies furnished to:

R. P. Warfield, Esquire
226 South Palafox Street
Pensacola, Florida

David Selby, Esquire
P. O. Box 1447
Fort Walton Beach, Florida

James W. Middleton, Esquire
P. O. Drawer 1767
Fort Walton Beach, Florida

Johnny Fortune, Esquire
P. O. Drawer F
Fort Walton Beach, Florida

David W. Palmer, II
P. O. Box 95
Crestview, Florida

by regular course of the U. S. Mail

/s/ [illegible]
Walter J. Smith
SMITH, GRIMSLEY, BARRON & REMINGTON
P. O. Drawer LL
Fort Walton Beach, Florida
Attorneys for Petitioner

[Certified]

EXHIBIT E.

In the Circuit Court for Okaloosa County, Florida.

In re: Estate of Coleman L. Kelly, Deceased.

ORDER

This cause coming on for hearing on Petition for Letters of Administration or Probate of Will which was continued by order of this Court on December 5, 1973 and upon Petition for Probate of Will by L. Bernarr Kelly and others designated in the Will to be Executors, and the Court having heard the testimony of attesting witnesses to the purported Last Will of Coleman L. Kelly and the testimony of those Executors and Trustees named in said purported Last Will who were present and qualified to serve and it appearing to the Court from the evidence submitted that Coleman L. Kelly died on September 29, 1973 and at the time of his death was domiciled in Okaloosa County, Florida; the decedent left the instrument now presented to this Court as his Last Will dated the 4th day of December, 1964 and attested and subscribed by John F. Campbell, Winston G. Walker and Howard F. McGee as witnesses and proof of the execution and testation of the Will having been made as required by Law by the testimony of Howard F. McGee and Winston G. Walker, and it further appearing to the Court that based upon the testimony before this Court on the 5th day of December, 1973 and the 17th day of January, 1974 that there are conflicting or adverse interests among the six persons named as Executors and Trustees of the Last Will of Coleman L. Kelly, deceased and the Court believes that there is a probability that if the said named Executors and Trustees are appointed that wasting of the assets or maladministration of the estate or trust will occur and the Court being further advised in the premises, it is, thereupon,

ORDERED:

1. That the instrument presented to this Court as the Last Will of Coleman L. Kelly be and the same is hereby admitted to record as the Last Will of Coleman L. Kelly, deceased.

2. That the Court upon its own motion hereby removes the named Co-Executors and Trustees in the Last Will of Coleman L. Kelly, and the Court hereby appoints The Valparaiso Bank and Trust Company of Valparaiso, Florida, as Administrator Cum Testamento Annexo of the Estate of Coleman L. Kelly, deceased and Trustee of the Testamentary Trust contained in the Last Will of Coleman L. Kelly.

DONE AND ORDERED in Okaloosa County, Florida, this 17th day of January, 1974.

/s/ Erwin Fleet
ERWIN FLEET
Circuit Judge

Conformed copies mailed or delivered this 28th day of January, 1974 to: David W. Palmer, Esq., P. O. Box 95, Crestview, Florida; Walter J. Smith, Esq., Smith, Grimsley, Barron & Remington, P. O. Drawer LL, Fort Walton Beach, Florida; James Middleton, Esq., P. O. Drawer 1767, Fort Walton Beach, Florida; Virginia S. Barr, Attorney at Law, P. O. Drawer M, Fort Walton Beach, Florida; David Selby, Esq., Lee, Selby & Tolton, P. O. Drawer 1447, Fort Walton

Beach, Florida; and Richard Warfield, Esq., Levin, Warfield, Graff, Mabie & Rosenblum, P.A., 250 Professional Building, 24 West Government Street, Pensacola, Florida.

/s/ Johnny Fortune
JOHNNY FORTUNE of
LSTERGREN, FORTUNE & ANCHORS
Attorneys & Counsellors at
P. O. Drawer F
Fort Walton Beach, FL 32548

[Certified]

APPENDIX C.

ORDER.

In the United States Court of Appeals for the Fifth Circuit, Unit B, No. 79-5512.

United States of America, Plaintiff-Appellee, versus, Joseph D. Fontenot, Defendant-Apellant. Appeal from the United States District Court for the Northern District of Florida.

Filed, Aug. 21, 1980.

Order:

IT IS ORDERED that appellant's motion for leave to supplement the record on appeal is DENIED.

/s/ Paul H. Roney
U.S. Circuit Judge

APPENDIX D.

(Excerpts from Pages 17, 18 and 19 of Appellant's Supplemental Brief).

In the United States Court of Appeals for the Fifth Circuit.

United States of America, Plaintiff-Appellee, vs. Joseph D. Fontenot, Defendant-Appellant. No. 79-5512.

Appeal from the United States District Court for the Northern District of Florida.

. . . The government cites *United States v. Alvarez*, 580 F.2d 1251, 1260 (5th Cir. 1978) in support of its contention that there was no showing of a conflict of interest with regard to counsel for the defense.

The *Alvarez* case stands for the proposition that an accused is deprived of his Fifth and Sixth Amendment rights to effective counsel, even in the absence of showing prejudice, when his attorney operates under an actual conflict of interest. (*Alvarez, supra*, 1258-59).

The defendant was represented at trial by an attorney who failed to disclose a conflict of interest. The defense attorney's firm at the time of trial, was concurrently representing one of the heirs with respect to the matter of probate estate of Coleman Kelly. Defendant's ex-wife had married Coleman Kelly and the four children of Defendant and his first wife have an interest in the estate which is adverse to that of the heir(s) which the defense attorney was representing. Moreover, Joann Fontenot, the current wife of the Defendant, has been told she is the natural daughter of Coleman Kelly, and her interests would be adverse to those represented by the defense attorney. Moreover, since the estate is a very large one, serious conflicting claims are probable. (See Defendant's motion to Augment the Record filed with the court herein.)

The impropriety of this undisclosed dual representation is apparent as the subject matter of the trial was concerned with alleged gifts from Coleman Kelly to Joann Fontenot and there was testimony as to whether or not Coleman Kelly was the father of Joann Fontenot, or whether these two parties were dating. Thus, issues raised were directly adverse to the interests of the heir(s) who were simultaneously being represented by this defense attorney.

Another relative of Coleman Kelly, Phyllis Daniels, was also a witness at trial (R III, 230).

Thus, within the meaning of the *Alvarez* case, there was an actual conflict of interest. The defendant was prejudiced not only because an actual conflict of interest existed but because he was not apprised of this fact by his own attorney. The disciplinary rules of the American Bar Association provide that a lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representations of another client (American Bar Association, Disciplinary Rule No. 5-105[c]). Even if a lawyer can adequately represent the interests of multiple clients, he is in violation of the disciplinary rules if he fails to make a full disclosure of the possible effect of such representation to his client. (American Bar Association, Disciplinary Rule No. 5-105(a)(b).

It is submitted that this actual conflict of interest, in addition to the aforementioned ineffective assistance of counsel, rendered the proceedings fundamentally unfair and have deprived the defendant of effective assistance of counsel.

. . .

APPENDIX E.

Motion to Stay Further Appellate Proceedings and for Remand to the District Court for Leave to File a Motion for New Trial or in the Alternative Motion to Set Aside Sentence (28 United States Code §2255) Declarations, Memorandum of Points and Authorities in Support Thereof (Including Exhibits A, B, C, D and E).

United States Court of Appeals for the Fifth Circuit, United States of America, Plaintiff/Appellee, vs. Joseph D. Fontenot, Defendant/Appellant. CASE NO. 79-5512. To: The Appellate Division of the United States Court of Appeals for the Fifth Circuit.

COMES NOW, JOSEPH D. FONTENOT, Appellant in the above-captioned matter, by and through his counsel of record, ZEUTZIUS, LaBRAN & WOLFSON, who hereby moves this Honorable Court for a stay of further appellate proceedings and for remand to the trial court to permit the filing of a motion for new trial and/or a motion to set aside sentence.

This motion is made under Rule 33 of the Federal Rules of Criminal Procedure, 28 United States Code §2255, the declarations, points and authorities filed herewith, and all records and documents on file herein and based on grounds stated as follows:

(A) During the trial Defendant/Appellant was deprived of his Sixth Amendment right to effective assistance of counsel in that his attorney had an actual and undisclosed conflict of interest; said conflict was not discovered until after trial was completed and verdict rendered.

(B) During the trial Defendant/Appellant was deprived of his Sixth Amendment right by failure of his attorney to

render reasonably effective assistance in the preparation, investigation, and conduct of his defense.

The Defendant further bases said motion on good cause shown as follows:

(1) During the trial in the United States District Court for the Northern District of Florida (Pensacola Division), the Defendant was represented by T.L. Middlebrooks, Esq., who was his counsel of record at all stages of the proceedings until the within appeal.

(2) After the jury rendered a verdict of guilty, the Defendant was sentenced to six months in jail, and is now free on bail pending the outcome of the within appeal.

(3) After the trial was completed, and after verdict was rendered, the defendant discovered that Mr. Middlebrooks' firm, (Levin, Warfield, Middlebrooks, Mabie, Rosenbloum, et al.) was and had been at the time of trial, representing clients with interests adverse to those of Defendant, the Defendant's children, and the Defendant's wife.

(4) The conflict of interest is summarized as follows:

During the trial, testimony was given regarding the relationship between Defendant's wife, Joann Fontenot, and Coleman Kelly. (T.R. R-II 120-139; R-III, 140-147; 229-250; 320-358). The nature of this testimony concerned Joann Fontenot's alleged relationship with Coleman Kelly—whether he was her natural father, or whether she was dating him. Extensive testimony was permitted without objection on the part of Mr. Middlebrooks to establish the motivation of gifts from Coleman Kelly which were given to Joann Fontenot. One of the witnesses called was Phyllis Daniels, grand-niece of Coleman Kelly (T.R. III-239).

(5) Subsequent to the trial, Defendant Fontenot became aware for the first time that Mr. Middlebrooks' firm, Levin, Warfield, Middlebrooks, Mabie, Rosenbloum, et al., had been representing one or more of the heirs of Coleman Kelly

at the time of trial. Defendant had no knowledge of this fact during the trial itself.

(6) The fact of representation by Mr. Middlebrooks' firm of the heir(s) of Coleman Kelly presents a serious conflict of interest on the part of Mr. Middlebrooks in that:

(a) Joann Fontenot (present wife of the Defendant Fontenot) testified she had been told that she was the natural child of Coleman Kelly and thus has an adverse interest to the heirs (clients of Mr. Middlebrooks).

(b) The ex-wife of Defendant Fontenot had married Coleman Kelly and the four children of Defendant Fontenot and his ex-wife also have an interest adverse to the heirs (clients of Mr. Middlebrooks).

(c) The aforementioned testimony by Joann Fontenot was directly and specifically concerned with interests adverse to Mr. Middlebrooks' firm's duties and obligations with regard to his representation in connection with the probate Estate of Coleman Kelly and within matter.

(7) The Defendant attempted to raise said conflict of interest issue on appeal in conjunction with the issue of ineffective representation of counsel and in that regard submitted a motion for leave to supplement the record on appeal on or about July 27, 1980. Said motion was denied and Defendant was unable to add certified copy of an Order dated March 7, 1975 of the Circuit Court of Okaloosa County, Florida, In the Matter of the Probate Estate of Coleman Kelly (Case Number 73-135), which refers to Mr. Warfield of Mr. Middlebrooks' firm, to the record on appeal.

(8) Subsequent to said motion, the Defendant obtained additional documentation of the existence of said dual representation on the part of his trial attorney and in an effort to provide a factual basis for treatment of this issue on

appeal, a second motion to supplement the file was filed on or about August 3, 1980. Said motion requested that certified copies of five documents filed with the Circuit Court of Okaloosa County, Florida, pursuant to the Probate Estate of Coleman Kelly be added to the record on appeal. Said motion came on for hearing on August 18, 1980, and was denied.

(9) The documents the Defendant attempted to add to the record consisted of the following:

(a) A certified copy of a Petition dated January 29, 1974, submitted by R.P. Warfield, Esq., on behalf of Mattie Sims to the Circuit Court of Okaloosa County, Florida, In Re Estate of Coleman Kelly (Case Number 73-135); a true and correct copy is attached herewith as Exhibit "A" and incorporated herein by reference. Said document was offered for purposes of establishing that R.P. Warfield, of Mr. Middlebrooks' firm, was representing Mattie Sims, the former wife of Coleman Kelly. The fact of representation by Mr. Middlebrooks' firm of Mattie Sims, presents a serious conflict of interest on the part of Mr. Middlebrooks in that Joann Fontenot testified she had been told she was a natural child of Coleman Kelly and thus has an interest in Estate of Coleman Kelly The ex-wife of Defendant Fontenot had married Coleman Kelly and the four children of Defendant Fontenot and his ex-wife have an interest in the Estate of Coleman Kelly Mattie Sims has an adverse interest to Defendant's wife, Joann Fontenot with regard to the Estate of Coleman Kelly in that Mattie Sims had alleged that certain funds in said estate were co-mingled funds belonging to a trust to which she was a beneficiary. For the same reasons as herein stated Mattie Sims also has an interest adverse to that of the children of Defendant Fontenot and his first wife (who subsequently married Coleman Kelly).

(b) Petition filed by R.P. Warfield on behalf of Mattie Sims In Re Estate of Coleman Kelly in the Circuit Court of Okaloosa County, Florida; a true and correct copy is attached herewith as Exhibit "B" and incorporated herein by reference.

(c) Motion for Continuance in the case of Mattie M. Kelly, plaintiff, vs. Coleman L. Kelly, Defendant, in the Circuit Court of Okaloosa County, Florida, Case Number 72-305, filed by R.P. Warfield on behalf of Mattie Kelly, on November 22, 1972; a true and correct copy is attached heewith as Exhibit "C" and incorporated herein by reference.

(d) Certified copy of Election of Dower filed by Jeanne Kelly In Re Estate of Coleman Kelly in the Circuit Court of Okaloosa County, Florida, showing R.P. Warfield, Esq., as receiving copy; a true and correct copy is attached herewith as Exhibit "D" and incorporated herein by reference.

(e) Order Admitting Will To Probate In Re: Estate of Coleman Kelly on January 17, 1974, in the Circuit Court for Okaloosa County, Florida, showing conformed copy mailed to Richard Warfield, Esq.; a true and correct copy is attached herewith as Exhibit "E" and incorporated herein by reference.

(10) The denial by the within Court of Defendant's second motion to supplement the record containing the above certified court documents has rendered Defendant's appeal virtually devoid of any factual basis to assert his claim of an actual and adverse conflict of interest on the part of his attorney during the trial, which deprived him of his Sixth Amendment right to effective assistance of counsel and Defendant is thereby requesting that the within Court grant stay of any further appellate proceeding and to remand the case to District Court, that he may pursue the critical issue of the conflict of interest.

(11) Subsequent to his trial, Defendant has also become informed that Mr. Middlebrooks was aware that Defendant's own accountant was assisting the government with the prosecution of the case. However, Mr. Middlebrooks failed to pursue this information in connection with the conduct of the defense during the trial and failed to assert the accountant client privilege and alternatively to pursue the accountant involvement in the prosecution of the case.

(12) During the trial the Defendant's attorney was impaired, thus affecting his ability and skills in conducting the defense. Moreover, subsequent to the trial Defendant also discovered that his attorney failed to conduct a proper investigation preparation for the case and during the trial failed to follow rules of evidence and did not object to inflamatory prejudical testimony, thus failing to meet the minimum standard of rendering reasonably effective assistance to the Defendant and failed to pursue the accountant's involvement in the prosecution of the case.

DATED: This _____ day of _____ , 1980.

Respectfully submitted,

ZEUTZIUS, LaBRAN & WOLFSON

STEPHEN R. WOLFSON

Attorney for Defendant/Appellant

MEMORANDUM OF POINTS AND AUTHORITIES

A Motion for New Trial Is Proper, in the Interests of Justice, When New Evidence Is Discovered Subsequent to the Trial.

Rule 33 of the Federal Rules of Criminal Procedure provides in pertinent part:

> ". . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case . . ."

As more particularly described in the attached declarations, defendant Fontenot first became cognizant of information relative to the trial attorney's conflict of interest subsequent to the trial. The issues centering around ineffective assistance of counsel were also first discovered by the defendant upon a review of the proceedings of the trial with appellate counsel.

When evidence of the ineffective assistance of counsel is brought to the attention of the court for the first time in support of a motion for new trial, that evidence is "newly discovered" for purposes of Rule 33 of the Federal Rules of Criminal Procedure. *United States v. Thompson,* 475 F.2d 931 (D.C. Cir. 1973).

When Counsel Discovers an Ineffective Assistance of Counsel Issue During the Pendency of an Appeal, the Proper Procedure Is for Counsel to Raise That Issue by a Motion for New Trial in the District Court.

Inasmuch as evidence of trial counsel's ineffectiveness is frequently not reflected in the trial record, this critical issue cannot properly be reviewed upon appeal.

> "Thus, when a claim of ineffective assistance of counsel is contemplated, it should first be presented to the

> district court in a motion for new trial. In such a proceeding, evidence *dehors* the record may be submitted by affidavit, and when necessary, the district judge may order a hearing or otherwise allow counsel to respond. If the trial court is willing to grant the motion, this court will remand. If the motion is denied, the appeal therefrom will be consolidated with the appeal from the conviction and sentence. The record of any hearing held on the motion, and any documents submitted below will become part of the record on appeal. (Footnotes eliminated.) *United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973).

While DeCoster motions are not always based on newly discovered evidence, there is authority for the proposition that an ineffective assistance motion may be considered as resulting from newly discovered evidence — thus removing it from the 7-day time limitation to the two year period delineated in Rule 33 of the Federal Rules of Criminal Procedure. (*United States v. Brown*, 476 F.2d 933, 935, n.11 (D.C. Cir. 1973). Moreover, the due diligence standard governing the disposition and timeliness of new trial motions does not apply where the complained of subject is of constitutional dimension. (*Marshall v. United States*, 436 F.2d 155, 159 n. 11 (D.C. Cir. 1970); *United States v. Tindle*, 522 F.2d 689 (D.C. Cir. 1975).

It is contended that the issue raised by the newly discovered evidence centering around an actual, adverse conflict of interest, is so inextricably intertwined with the issue of ineffective assistance of counsel constituting a Sixth Amendment violation, that they necessarily are both properly the subject of the proposed motion for new trial.

If the within court denies this motion, the defendant's appeal will proceed without accurate, complete documentation (or any documentation) to apprise the court of the

violation of his Sixth Amendment rights. He will then have to bring the motion for new trial if an unfavorable decision is rendered. It is submitted that highly favorable grounds exist for the granting of the motion for new trial. However, if the motion for new trial were to be denied, defendant would then have to bring another appeal before the within court. Thus, it is clearly within the interests of expediency as well as the ends of justice that the within motion for stay be granted.

Defendant's Proposed Motion for New Trial Is Likely to Succeed in That It Will Be Based Upon Testimony, Certified Court Documents, and Facts Showing a Direct, Actual Adverse Conflict of Interest as Well as Ineffective Assistance of Counsel, Which Deprived This Defendant of His Sixth Amendment Rights.

A. Conflict of Interest Issue

As more particularly set forth in the declarations, defendant Fontenot discovered subsequent to trial that his counsel was representing (at the time of trial) interests adverse to him, to his present wife, and to his children by his first wife. For example, as mentioned previously, a great deal of testimony was solicited by the government from Mrs. Fontenot regarding her personal relationship with Coleman Kelly and whether he was her father or her lover. It is notable that an examination of the trial transcript reveals not even one objection from defense counsel to this testimony in a case involving alleged corporate income tax deficiencies. It is submitted that a motion for new trial will allow the defendant to show that his attorney had an interest in permitting Mrs. Fontenot to be classified as Coleman Kelly's lover, rather than his natural daughter because his firm represented heirs of Coleman Kelly and that his failure to object cast the witness in a highly prejudicial light in

front of the jury. Each of the attached exhibits shows there is a connection between the Coleman Kelly probate estate and defense counsel's firm.

> "The Sixth Amendment guarantees a defendant in a federal criminal trial the right to counsel reasonably likely to render and rendering effective assistance." (*United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir. 1978)).

The *Alvarez* case further states:

> "[Effective representation] is lacking, however, if counsel, unknown to the accused and without his knowledgeable account, is in a duplicitous position where his full talents—as a vigorous advocate having the single aim of acquittal by all means fair and favorable are hobbled or fettered by commitments to others." (Alvarez, *supra*, at 1254).

The *Alvarez* case states the standard applied in the 5th Circuit with regard to ineffective assistance of counsel. Even though the *Alvarez* case involves multiple representation of co-defendants, the Courts have enumerated a variety of situations not limited to multiple representation of co-defendants in which a conflict of interest is found. The Courts have insisted counsel's allegiance to the defendant remain unaffected by competing obligations to other clients. (See *Porter v. United States*, 298 F.2d 461 (5th Cir. 1962) *MacKenna v. Ellis* 280 F.2d 592 (5th Cir. 1960), modified 289 F.2d 928, *cert. denied*, 368 U.S. 877 (1961) *Castillo v. Estelle* 504 F.2d 1243 (5th Cir. 1974) 34 ALR 3d 470 (1970).

The declarations attached herewith contain facts to establish that not only did an conflict of interest exist, if was an "actual conflict" within the meaning of *Alvarez* (See *Alvarez, supra* at 1258-1259).

Moreover, in three recent cases, each involving ineffective representation of counsel, the court found constitutional violations without even inquiring into prejudice. (*Davis v. State of Alabama*, 596 F.2d 1214 (5th Cir. 1979), *Geders v. United States*, 425 U.S. 80 (1976), rev'g. *United States v. Fink*, 502 F.2d 1 (5th Cir. 1974); *Herring v. New York*, 422 U.S. 853, (1975); *Holloway v. Arkansas*, 435 U.S. 475 (1978).) Some circuits have gone farther still and have even held a defendant never needs to show prejudice to establish he was denied effective assistance of counsel.

(See *Cooper v. Fitzharris*, 551 F.2d 1162, 1164-1165 (9th Cir. 1977); *Beasley v. United States*, 491 F.2d 687, 696-97 (6th Cir. 1974)).

B. Ineffective Assistance of Counsel

In treating the issue of ineffective assistance of counsel, the Fifth Circuit applies the test of whether counsel was reasonably likely to render and did render reasonably effective assistance of counsel.

United States v. Gray, 565 F.2d 881 (5th Cir. 1978);

Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974);

Hudson v. State of Alabama, 493 F.2d 171, 173 (5th Cir. 1974).

The appropriate area of inquiry is stated as follows:

> "A review of Fifth Circuit law indicates that this Court's methodology involves an inquiry into the actual performance of counsel in conducting the defense and a determination whether reasonably effective assistance was rendered based on the totality of the circumstances and the entire record. This Circuit does not blindly accept speculative and inconcrete claims of "what might have been if." If an appellant can point to specific examples of ineffectiveness, we have not hesitated

to grant a new trial or hearing.'' *United States v. Gray, supra,* at 887

It is submitted that the defendant can establish many specific instances of ineffectiveness such as the following:

(1) Failure of defendant's attorney to pursue his belief that defendant's accountant assisted the government in its case, thus violating the accountant client privilege.

(2) Defendant's attorney was proceeding at trial under a mental and/or physical impairment or illness which greatly affected his skill, memory, and ability to conduct the defense;

(3) Failure to object to highly inflammatory evidence suggesting defendant's wife was committing incest, or that she was a prostitute, or that she was involved in an extramarital affair in a trial by jury. (See Appellant's Supplemental Brief, p.5-6).

(4) Failure to request Jencks statements before trial, thus precluding proper preparation and investigation. (See Appellant's Supplemental Brief p. 16; Appellant's Opening Brief p. 557);

(5) Failure to prepare for *Miranda* problems (See Appellant's Opening Brief p. 55-56; Appellant's Supplemental Brief p. 16);

(6) Failure to hire expert witness to refute government expert and the government's numerical chart upon which the government's case was based to great degree. (See Appellant's Supplemental Brief p. 16-17).

(7) A general failure to investigate and prepare the case, as well as inadequate cross-examination of witnesses.

It is further submitted that if permitted to bring the proposed motion for new trial, defendant can establish that this is *not* a case of ''counsel judged ineffective by hindsight'', nor a case of ''tactical decisions which in retrospect might have been wrong'', but, rather a situation whereby numer-

ous factors prevented the trial attorney from rendering effective assistance of counsel (See *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir. 1977); *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), modified 289 F.2d 928 (5th Cir. 1961).

Defendant Is Alternatively Entitled To Bring A 28 USC §2255 Motion To Vacate Sentence Notwithstanding The Pendency Of A Direct Appeal.

In *United States v. Tindle*, 552 F.2d 689 (D.C. Cir. 1975) the court has held that notwithstanding the Womack rule of judicial administration (*Womack v. United States*, 395 F.2d 630, 631 (D.C. Cir. 1968)) which normally precludes a §2255 motion during an appeal, a §2255 motion is proper in the case at hand. The *Tindle* court states:

> "In order to give effect to the salutary procedure instituted by this Court in *DeCoster* we feel an appropriate adaptation of the *Womack* rule is in order. Consequently, we hold that filing of a *DeCoster* motion for a new trial constitutes the "special circumstances" set forth in *Womack* as permitting consideration of a §2255 motion in District Court during the pendency of a direct appeal. We also approve of the course taken by the District Court in this case, of considering technically untimely new trial motions, by entertaining them as motions under 28 U.S.C. §2255." (Footnotes eliminated.) *Tindle, supra* at 693.

Thus, defendant submits that even if the court determines that the ineffective assistance of counsel issue can be separated from the conflict of interest issue which is raised by new evidence (and thus determines it is untimely per Federal Rules of Criminal Procedure, Rule No. 33) the issue may be properly raised via a §2255 motion to vacate sentence that was imposed because of a Sixth Amendment violation.

§2255 provides that a sentence may be set aside or vacated when imposed in violation of the Constitution or Laws of the United States and that a motion for such relief may be made at any time.

Conclusion

The Constitutional ramifications of the relief being sought herein are succinctly expressed by the court in the *DeCoster* case:

> "The effective assistance of counsel is a defendant's most fundamental right "for it affects his ability to assert any other right he may have." The Supreme Court has observed, "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel." (Footnotes omitted.) *United States v. DeCoster, supra*, at 1201

The defendant has made every attempt to bring before the within court the full issue of the conflict of interest/ ineffective assistance of counsel. However, inasmuch as the court has denied the second motion to supplement the record, the appeal does not present to the court serious constitutional violations.

The within Court is respectfully requested to stay further proceedings, that a motion for new trial and/or a §2255 motion may be brought, which would either render the appeal moot, or at least permit this defendant to have a full and complete resolution of the appeal by the addition into the record of the Motion for New Trial and all records, documents and testimony pursuant thereto.

DATED: This _____ day of _____ , 1980

Respectfully submitted,

ZEUTZIUS, LaBRAN, & WOLFSON

STEPHEN R. WOLFSON

DECLARATION

I, STEPHEN R. WOLFSON, declare as follows:

1. That I am an attorney at law and associated of the law firm of ZEUTZIUS, LaBRAN & WOLFSON.

2. That I am admitted to practice before the United States Court of Appeals for the Fifth Circuit.

3. That I am counsel of record for the Defendant/Appellant in the within appeal, but was not counsel of record during the trial.

4. That subsequent to his trial in the United States District Court, defendant Fontenot retained my services for purposes of his appeal.

5. That subsequent to his trial, defendant Fontenot informed me that he discovered his trial attorney was proceeding at trial under an adverse conflict of interest and that he did not receive effective assistance of counsel at the time of his trial and this lack of effective representation resulted in his conviction. Upon an investigation of this issue, I have obtained the court documents which are attached herewith as Exhibits A, B, C, D. and E, for purposes of making a motion to supplement the record on appeal in order to place this issue before the within court. Said motion was denied on August 18, 1980, at the time of oral argument of the appeal, and in an effort to place this issue of newly discovered evidence and the issue of ineffective assistance of counsel before the court, the within motion has been brought.

6. As indicated by the foregoing, this motion is not being brought for purposes of delay and is being pursued as the only method by which the constitutional violations of this defendant's Sixth Amendment rights can be asserted.

7. That investigation into the aforementioned conflict of interest is still in progress and if granted leave to bring

the motion for new trial, competent evidence supporting the issues of an actual conflict of interest as well as ineffective assistance of counsel will be presented.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of September, 1980 at Pasadena, California.

STEPHEN R. WOLFSON

DECLARATION OF JOSEPH FONTENOT

I, JOSEPH FONTENOT, declare as follows:

1. That I am the defendant and appellant of the above-entitled matter.

2. The during my trial I was represented by D.L. Middlebrooks, Esq.

3. That during the three days of my trial, Mr. Middlebrooks sometimes acted in an incoherent, confused manner and I could smell the odor of alcohol on his breath.

4. On September 5, 1979, after I was sentenced, a conversation took place in Mr. Middlebrooks office between myself, my wife, Joann Fontenot, and Mr. Middlebrooks. At this time, Mr. Middlebrooks told me he had information at the time of and prior to trial, that my accountant, Mr. Totten, assisted the government with its case. To my knowledge, my attorney, Mr. Middlebrooks, never acted upon this information in the preparation of my defense. I was never aware of any assistance given to the government by my accountant until this conversation on September 5, 1979, or any offer of assistance by my accountant or a member of his staff.

5. That Mr. Middlebrooks was representing me at the time of trial without informing me that his firm was representing interests directly adverse to my own, my wife's and my children's interests.

6. That the substance of the conflict of interest stated above is as follows: Mr. Middlebrooks' firm was representing one or more of the heirs of Coleman Kelly at the time of trial. This fact was not disclosed to me during the trial. For had it been, I would have fired Mr. Middlebrooks and hired a new competent and non-bias counsel.

My first wife, after divorcing me, married Coleman Kelly and the six children we had have an adverse interest to the

client of Mr. Middlebrooks' firm. Mr. Middlebrooks was aware that my ex-wife married Coleman Kelly. My present wife, Joann Fontenot, has been told she is the natural child of Coleman Kelly (and so testified at trial) and therefor has an interest in the Coleman Kelly estate which is adverse to Mr. Middlebrooks' firm's clients.

7. The testimony at trial by my wife, Joann Fontenot, as solicited by the government, concerned whether my wife was the daughter of Coleman Kelly, or whether she was dating him. It is my belief that Mr. Middlebrooks did not object to this line of questioning (in a case alleging corporate tax deficiency) because it was to his firm's advantage to allow the government to infer my wife was dating Coleman Kelly and was not his daughter. It is my belief that these statements, in being heard by the jury, largely contributed to my conviction and were the direct result of Mr. Middlebrooks' conflict of interest.

8. That all of the above information regarding a conflict of interest on the part of my trial attorney, became known to me after my trial and after I was sentenced.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9 day of Sept., 1980, at New Orleans, La.

/s/ Joseph D. Fontenot
JOSEPH D. FONTENOT

DECLARATION OF JOANN FONTENOT

I, JOANN FONTENOT, declare as follows:

1. That I am married to Joseph Fontenot, defendant and appellant in the above-captioned matter.

2. That I was a witness during the within trial and testified extensively.

3. That on September 5, 1979, after my husband, Joseph Fontenot, was sentenced, I was present during a conversation that took place with Mr. Middlebrooks in his office. At that time, Mr. Middlebrooks stated that he had information at the time of trial and prior to trial, that my husband's accountant, Mr. Toten, assisted the government with its case.

4. That prior to the time of trial, Coleman Kelly informed me that he was my natural father.

5. That I told Mr. Middlebrooks that I was Coleman Kelly's daughter prior to the time of trial.

6. That during the three days of the trial, Mr. Middlebrooks sometimes acted in an incoherent, confused manner and I could smell the door of alcohol on his breath.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of September, 1980, at New Orleans, Louisiana.

/s/ Joan Fontenot
JOANN FONTENOT

PETITION.

In the Circuit Court in and for Okaloosa County, Florida, Probate Division.

In re: Estate of Coleman L. Kelly, Deceased. Case No. 73-135.

Your petitioner, MATTIE M. SIMS, by her undersigned attorneys, respectfully petitions this court as follows:

1. Petitioner is a natural person residing in Destin, Okaloosa County, Florida, and her post office address is P. O. Box 425, Destin, Florida.

2. The is the former wife of the decedent, Coleman L. Kelly, their marriage having been dissolved by Final Judgment of the Circuit Court of Okaloosa County, Florida in Case No. 70-5925, on June 25, 1971.

3. That pursuant to the Separation Agreement entered into between the petitioner and the decedent, which Separation Agreement was incorporated into the terms of the aforesaid Final Judgment of Divorce, petitioner was a beneficiary of the Trust created thereby and was also named as the successor Co-Trustee upon the death of the said Coleman L. Kelly. And pursuant to an interlocutory order entered by the Circuit Court of Okaloosa County, Florida in that certain suit wherein petitioner was plaintiff and Coleman L. Kelly, as Trustee, was defendant, the said petitioner was appointed as a Co-Trustee of the said Trust on September 4, 1973. A copy of the said Separation Agreement and interlocutory order are attached hereto and by reference made a part hereof.

4. The Trust Estate consists of vast holdings in real and personal property, including cash and certificates representing cash. Petitioner is informed, believes and therefore alleges that prior to the death of decedent he did not maintain complete and proper records of his activities as Trustee and

that some co-mingling of funds belonging to the Trust Estate with the decedent's purported personal funds took place. Therefore the petitioner, as beneficiary, under the terms of the aforesaid Trust has an interest in this Estate to the extent of such funds that might rightfully belong to the Trust

WHEREFORE, petitioner prays that this court will enter its order directing and requiring the decedent's personal representative, and all other interested persons or parties to serve upon her or her attorneys copies of all pleadings, inventories, apprailals and notices that may hereafter be filed in this cause.

State of Florida County of Escambia.

Before me, the undersigned authority, this day, personally came and appeared Mattie M. Sims, known to me and known to be the individual so described who, after being first duly sworn on oath, deposes and says she is petitioner herein and the matters and allegations herein contained are true and correct.

/s/ Mattie M. Sims
MATTIE M. SIMS

Sworn to and subscribed before me this 29th day of January, 1974.

/s/ [illegible]
NOTARY PUBLIC
My comm. exp.:1/27/78

CERTIFICATE OF SERVICE

I hereby certify that I furnished a copy of the foregoing petition by mail to Johnny Fortune, Esq., attorney for Valparaiso Bank & Trust Company, Post Office Drawer F, Fort Walton Beach, Florida; David W. Palmer, Esq., attorney for L: Bernarr Kelly, Carol Kelly Adams and Cecelia Kelly Metz, 468 North Main Street, Crestview, Florida; David

Selby, Esq., attorney for Imogene Kelly Toole, Post Office Drawer 1447, Fort Walton Beach, Florida; and James W. Middleton, Esq., attorney for Carnera Lee Kelly, Post Office Drawer 1767, Fort Walton Beach, Florida, this 29 day of January, 1974.

/s/ R. P. Warfield
R. P. WARFIELD
Levin, Warfield, Graff, Mabie & Rosenbloum
Seville Tower, 226 South Palafox Street
Pensacola, Florida
Attorneys for Mattie M. Sims

[Certified]

NOTICE OF HEARING.

In the Circuit Court in and for Okaloosa County, Florida.

Mattie M. Kelly, Plaintiff, vs. The Valpariaso Bank & Trust Company, as Administrator C.T.A. of the Estate of Coleman L. Kelly, Deceased, Defendant. Case No. 70-5925.

Filed, Oct. 24, 1975.

To:
Johnny Fortune, Esquire
Estergren, Fortune, Anchors and Powell
P. O. Drawer F
Fort Walton Beach, Florida
Attorney for defendant herein.

And also to the following persons:

Walter J. Smith, Esq.
James W. Middleton, Esq.
David W. Palmer, Esq.
David L. Selby, Esq.
Virginia S. Barr, Esq.
Wilfred C. Varn, Esq.
Gregory M. Anchors, Esq.
J. LaDon Dewrell, Esq.
C. Roger Vinson, Esq.

And also to:
Fayette Dennison, CPA

You, and each of you, will please take notice that the undersigned attorneys will bring on for hearing before the Honorable Erwin Fleet, one of the judges of the above entitled court, in his offices in the Okaloosa County Annex Building in Fort Walton Beach, Florida, on the 25th day of November, 1975, at the hour of One Thirty O'Clock, P.M., their petition for the allowance of attorneys fees for

the services they heretofore render to the plaintiff, Mattie M. Kelly (Sims), in this cause of action.

You, and each of you, will please be governed accordingly.

/s/ R.P. Warfield
R. P. Warfield
Levin, Warfield, Middlebrooks, Graff,
Mabie, Rosenbloum & Magie
Seville Tower, 226 S. Palafox
Pensacola, Florida.
Attorneys for plaintiff

[CERTIFIED]

MOTION FOR CONTINUANCE.

In the Circuit Court in and for Okaloosa County, Florida.

Mattie M. Kelly, Plaintiff, vs. Coleman L. Kelly, individually ans as Trustee, Defendant. NO. 72-3057.

Filed Nov. 22, 1972.

The plaintiff, Mattie M. Kelly, by her undersigned attorneys, respectfully moves this Court to continue the trial of this cause of action now scheduled in Fort Walton Beach, Florida, on Tuesday, November 28, 1972 and as grounds for this motion says:

1. She has employed an accountant, one Benjamin A. Totten, to examine the books and records of the various and sundry business entities and operations comprising the entire trust estate.

2. That this accountant has spent many hours examining the books and records of said business entities and organizations and has consulted at length with the defendant's bookkeeper of many years, Mr. John Edwards, Pensacola, Florida. The sole purpose of the plaintiff's employment of this said accountant was so he could testify at the trial of this cause of action concerning the condition of the books and records and the manner in which the defendant, as trustee, and individually, had conducted, managed and operated the monies and properties which should have been put into the trust estate.

3. The plaintiff and her attorneys had a conference with the said accountant on Tuesday, November 21, 1972 in Fort Walton Beach in order to prepare for the trial of this cause of action. This was the first conference said attorneys had with said accountant inasmuch as it had taken him this length of time to prepare the books and records. During this conference it was discovered that the said account will be in Tampa, Florda on November 26, 27 and 28 in connection

with his duties as President of the Florida Accountants Association which is conducting a tax institute on those dates and the said accountant has a part of the program and will not be available on any of those dates to attend a trial of this cause of action. Attached hereto and my reference made a part hereof is a brochure reflecting these facts.

4. That in view of the complexity of his testimony and his necessity to refer to the books and records of the various business organizations and entities, the taking of his deposition, even if it could be scheduled and transcribed prior to the trial date, would be completely ineffective and virtually impossible to follow and comprehend.

5. The fact that the said accountant was not going to be available on November 28th was not known at the time the trial of this cause was scheduled for that date, and the plaintiff and her attorneys had no reason to know or believe he would not be available to testify. That this motion is made in good faith with no intention of unduly delaying the trial of this cause.

/s/ R. P. Warfield
R. P. WARFIELD
Levin, Warfield, Graff, Mabie &
Rosenbloum
250 Professional Building
Pensacola, Florida
Attorneys for Plaintiff

State of Florida County of Escambia

Before me, the undersigned authority, this day personally came and appeared R. P. Warfield, known to me and known to be the person so described who, after being first duly sworn on oath, deposes and says that he is petitioner herein and the matters and allegations herein contained are true and correct.

/s/ R. P. Warfield
R. P. WARFIELD

Sworn to and subscribed before me this 21st day of November, 1972.

NOTARY PUBLIC
My commission expires: 1/27/75

ELECTION OF DOWER.

In the Circuit Court in and for Okaloosa County, Florida

IN RE: The Estate of Coleman L. Kelly, Deceased. Probate No. 73-135.

ELECTION OF DOWER

Comes now Jeanne Kelly, widow of Coleman L. Kelly, deceased, and hereby elects to take dower in the estate of Coleman L. Kelly, which shall include one-third interest in all of the real and personal property owned by the decedent at the time of his death, including, but not limited to, the savings, real property, and assets of the Kelly Trust.

[illegible] (SEAL)
Jeanne Kelly

State of Florida County of Okaloosa

BEFORE ME personally appeared Jeanne Kelly, who after being duly sworn, deposes and says that she has read the foregoing document and the statements and facts contained therein are true and correct and that she executed the same for the uses and purposes therein stated.

WITNESS my hand and official seal in the County and State aforesaid this 25th day of February, 1974.

/s/ Mary M. Holly
Notary Public
My commission expires:
NOV 26, 1976

WALTER J. SMITH
SMITH, GRIMSLEY, BARRON & REMINGTON
P. O. DRAWER LL
FORT WALTON BEACH, FLORIDA
ATTORNEY FOR PETITIONER, JEANNE KELLY

CERTIFICATE OF SERVICE

I hereby certify that I furnished a copy of the foregoing motion for continuance to Walter J. Smith, Esq., attorney for defendant, by mail this 21st day of November, 1972.

/s/ R. P. Warfield
R. P. WARFIELD
Attorney for Plaintiff

[Certified]

ORDER.

In the Circuit Court for Okaloosa County, Florida.

In re: Estate of Coleman L. Kelly, Deceased.

This cause coming on for hearing on Petition for Letters of Administration or Probate of Will which was continued by order of this Court on December 5, 1973 and upon Petition for Probate of Will by L. Bernarr Kelly and others designated in the Will to be Executors, and the Court having heard the testimony of attesting witnesses to the purported Last Will of Coleman L. Kelly and the testimony of those Executors and Trustees named in said purported Last Will who were present and qualified to serve and it appearing to the Court from the evidence submitted that Coleman L. Kelly died in September 29, 1973 and at the time of his death was domiciled in Okaloosa County, Florida; the decedent left the instrument now presented to this Court as his Last Will dated the 4th day of December, 1964 and attested and subscribed by John F. Campbell, Winston G. Walker and Howard F. McGee as witnesses and proof of the execution and testation of the Will having been made as required by Law by the testimony of Howard F. McGee and Winston G. Walker, and it further appearing to the Court that based upon the testimony before this Court on the 5th day of December, 1973 and the 17th day of January, 1974 that there are conflicting or adverse interests among the six persons named as Executors and Trustees of the Last Will of Coleman L. Kelly, deceased and the Court believes that there is a probability that if the said named Executors Trustees are appointed that wasting of the assets or maladministration of the estate or trust will occur and the Court being further advised in the premises, it is, thereupon,

ORDERED:

1. That the instrument presented to this Court as the Last Will of Coleman L. Kelly be and the same is hereby admitted to record as the Last Will of Coleman L. Kelly, deceased.

2. That the Court upon its own motion hereby removes the named Co-Executors and Trustees in the Last Will of Coleman L. Kelly, and the Court hereby appoints The Valparaiso Bank and Trust Company of Valparaiso, Florida, as Administrator Cum Testamento Annexo of the Estate of Coleman L. Kelly, deceased and Trustee of the Testamentary Trust contained in the Last Will of Coleman L. Kelly.

DONE AND ORDERED in Okaloosa County, Florida, this 17th day of January, 1974.

/s/ Erwin Fleet
ERWIN FLEET
Circuit Judge

Conformed copies mailed or delivered this 28th day of January, 1974 to: David W. Palmer, Esq., P. O. Box 95, Crestview, Florida; Walter J. Smith Esq., Smith, Grimsley, Barron & Remington, P. O. Drawer LL, Fort Walton Beach, Florida; James Middleton, Esq., P. O. Drawer 1767, Fort Walton Beach, Florida; Virginia S. Barr, Attorney at Law, P. O. Drawer M, Fort Walton Beach, Florida; David Selby, Esq., Lee, Selby & Tolton, P. O. Drawer 1447, Fort Walton Beach, Florida; and Richard Warfield, Esq., Levin, Warfield, Graff, Mabie & Rosenblum, P.A., 250 Professional Building, 24 West Government Street, Pensacola, Florida.

/s/ Johnny Fortune
JOHNNY FORTUNE OF
LSTERGRIN, FORTUNE & ANCHORS, P.A.
Attorneys & Counsellors at Law
P. O. Drawer F
Fort Walton Beach, FL 32548

I HEREBY CERTIFY that on February 25, 1974,
Copies furnished to:
R. P. Warfield, Esquire
226 South Palafox Street
Pensacola, Florida
David Selby, Esquire
P. O. Box 1447
Fort Walton Beach, Florida
James W. Middleton, Esquire
P. O. Drawer 1767
Fort Walton Beach, Florida
Johnny Fortune, Esquire
P. O. Drawer F
Fort Walton Beach, Florida
David W. Palmer, II
P. O. Box 95
Crestview, Florida
by regular course of the U. S. Mail.

[illegible]
Walter J. Smith
SMITH, GRIMSLEY, BARRON & REMINGTON
P. O. Drawer LL
Fort Walton Beach, Florida
Attorneys for Petitioner

[Certified]

APPENDIX F

NO. 79-5512

8. MOTIONS

Filing Motion to or for:	Response Filed By	Date	Granted	Denied	By Court	By Clerk	Date
Mandamus							
Docket Appeal Out of Time							
Reinstate Appeal							
9-10-80 Stay Further Proceedings in CA and remand (Dtd 9-10-80 NTF)				✓	✓		10-9-8
Stay Pending Appeal	Appellee will file resp. by 10/6/80 per						
Injunction Pending Appeal	" " "

APPENDIX G.

EXCERPTS FROM PAGES 102, 103 AND 104 OF THE TRIAL TRANSCRIPTS.

In the United States District Court, for the Northern District of Florida, Pensacola Division.

The United States of America vs. Joseph D. Fontenot, Defendant. PCR 79-406.

I'll have to look at my notes, and I think we'll call Mr. Putnam, Mr. Toole. I thought his name was Poole but apparently it's Toole. Those two witnesses shouldn't take very long. Of course, I don't know what kind of an arrangement you want to make with Mr. Putnam.

MR. MIDDLEBROOKS: Do you have any statements taken from these people?

MR. SPRINGER: Yes.

THE COURT: Jencks Act statements?

MR. SPRINGER: You've never asked me for any.

THE COURT: Let me state now what I like to do there. As you know and I know, he doesn't, he's not really entitled to get them till after the witness testifies. That calls for recess. I would suggest to you if you've got Jencks Act statements from these people that what my attorneys do for me at this stage of the game, they give them to him.

MR. SPRINGER: I've got them all prepared. I'm waiting for the request.

THE COURT: You've just got it.

MR. SPRINGER: I have them all in one pack.

THE COURT: Go get them and give them to him right now.

MR. SPRINGER: I'll be happy.

THE COURT: So he has them to get ready. For example, you want a Jencks Act statement on the fellow testifying now. You wouldn't have one from the agent.

MR. SPRINGER: I was just going to get into that. It's our position that their reports are not Jencks material.

THE COURT: You mean his report of investigation would not be Jencks material.

MR. SPRINGER: Yes.

THE COURT: No. I would agree with that. You wouldn't quarrel with that.

MR. MIDDLEBROOKS: No, sir, I'm not quarreling for that. I haven't asked for one for Mr. Creel.

THE COURT: How's that?

MR. MIDDLEBROOKS: I haven't asked for one for Mr. Creel.

THE COURT: But on the fact witnesses is what we're talking about.

MR. SPRINGER: Sure.

THE COURT: Let me give you five minutes. You've got it down to give them to you this afternoon?

MR. SPRINGER: I was waiting for him to ask you.

THE COURT: He just did. We'll go in, in five minutes, and move along.

MR. SPRINGER: What I was going to state, our last witness would be after those two. I said Mr. Putnam and Mr. Toole. The last witness would be Mr. Roy Stewart and now he's going to take some time and I would appreciate if we could start him in the morning.

THE COURT: I started to say I was planning on running till about 5:00. It could be that's the way it's going to work out, take him last in the morning and move right along. That might be the way it works. . . .

Office-Supreme C... U.S.
FILED
MAY 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1514

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH D. FONTENOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in declining to consider petitioner's claim that a conflict of interest adversely affected his lawyer's performance at trial, where the record on appeal was insufficient to permit consideration of that claim.

2. Whether petitioner was deprived of a fair trial.

3. Whether petitioner received the effective assistance of counsel.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court issued no written opinion. The opinion of the court of appeals (Pet. App. 1) is reported at 628 F. 2d 921.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1980, and the petition for rehearing was denied on December 5, 1980. The petition for a writ of certiorari was filed on March 5, 1981, and was timely by virtue of a February 3, 1981, order of Justice Powell extending the time for filing the petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted on two counts of willfully making false statements in connection with the filing of corporate tax returns for the years

1972 and 1973, in violation of 26 U.S.C. 7206(1). The district court sentenced petitioner to six months' imprisonment on the first count and three years' probation on the second count (Pet. App. 1). The court of appeals affirmed (Pet. App. 1-10).

The evidence at trial showed that petitioner owned and operated a corporation through which he conducted the business of manufacturing and selling eyeglasses and hearing aids. The corporation operated two stores, one in Fort Walton Beach, Florida, and the other in Pensacola, Florida. At the Fort Walton Beach store, at which petitioner worked, two invoice machines were used to register daily sales. The first machine was used each day until invoices totalling approximately $200 had been recorded. At that point, all other invoices were recorded on the second machine. Only the money received with respect to the invoices registered on the first machine was entered on the corporation's books and deposited in the bank account of the Fort Walton Beach store. The invoices from the second machine were thrown away each day.[1] However, some, but not all, of the money received from the sales covered by these invoices was transferred for accounting purposes to the Pensacola store and was recorded on the corporation's books as having originated there.[2] The corporation's books reflected a total amount of invoices for the Pensacola store—*i.e.*, those that originated there and those that were transferred from the Fort Walton Beach store—that was substantially less ($25,702.81 less in 1972 and $11,053.17

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[1]Although the invoices from the second machine were thrown away by petitioner, they were retrieved by an employee, Harry Williams, each day and subsequently turned over to the Internal Revenue Service (Tr. 14). The remaining invoices were supplied to the Internal Revenue Service by petitioner during the investigation (Tr. 206-210).

[2]Harry Williams testified that petitioner retained a portion of the cash receipts that were recorded on the second invoice machine (Tr. 13-14).

less in 1973) than it would have been if *all* of the money received in connection with the invoices registered on the second machine at the Fort Walton Beach store had been transferred to and recorded at the Pensacola store (Tr. 13, 109-110, 117, 218-219).

ARGUMENT

1. Petitioner argues (Pet. 6-9) that the court of appeals erred in declining to consider his claim that the attorney who represented him at trial had a conflict of interest that adversely affected the attorney's performance at trial. The conflict of interest is said to have resulted because a member of the attorney's law firm was representing an individual who had made a claim against the estate of one Coleman Kelly—an estate in which, petitioner alleges, he or members of his family might have an interest.

Petitioner alleges (Pet. 3; Pet. App. 50-51) that he did not discover his trial counsel's asserted conflict of interest until after trial and after the notice of appeal had been filed in the instant case. Petitioner, through new counsel, filed a motion in the court of appeals (Pet. App. 11-30) to supplement the record on appeal with various documents pertaining to the probate of the estate in question. This motion was denied by the court of appeals on August 21, 1980 (Pet. App. 31). On September 10, 1980, petitioner filed another motion in the court of appeals (Pet. App. 34-39) to stay further proceedings and to remand the case to the district court to allow petitioner to file a motion for a new trial pursuant to Fed. R. Crim. P. 33 or to file a motion under 28 U.S.C. 2255 attacking his conviction on conflict of interest grounds. The court of appeals denied this motion on October 9, 1980 (Pet. App. F (after page 66)).

In its opinion affirming petitioner's conviction, the court of appeals rejected (Pet. App. 10 & n.10) petitioner's claim of ineffective assistance of counsel arising out of the alleged conflict of interest insofar as that claim was based on the

unsupplemented record on appeal. However, the court made clear (*ibid.*) that it was expressing no view about the effect, if any, that the supplemental material offered by petitioner would have on this conclusion. It therefore remains open to petitioner to renew his conflict of interest claim in the district court by means of a motion under 28 U.S.C. 2255 or for a new trial under Fed. R. Crim. P. 33, if he can establish that the information regarding the alleged conflict of interest is "newly discovered."

In these circumstances, the court of appeals plainly did not err in denying petitioner's motion to supplement the record on appeal. Even assuming, arguendo, that the material petitioner offered is accurate and would be thought to establish a conflict of interest, that material did not demonstrate the adverse effect on the lawyer's performance that must be shown to establish a Sixth Amendment violation resulting from an alleged conflict of interest. *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980). The effect of the alleged conflict on the lawyer's performance could be determined only after a development of all relevant facts in the district court, including an opportunity for the government to present evidence. Therefore, because the court of appeals could not have disposed of petitioner's claim in any event, the court did not err in denying the motion to supplement the record and requiring instead that petitioner present his claim to the district court in the first instance.

Nor did the court of appeals err in denying petitioner's motion to stay all appellate proceedings and remand to the district court to allow petitioner to raise his conflict of interest claim in the district court prior to disposition of his appeal. Petitioner had raised other issues on appeal, and there was no reason to delay appellate review of them while the district court considered petitioner's new claim of a conflict of interest. Indeed, if the court of appeals had reversed the conviction on other grounds, there would have

been no occasion for the court of appeals or the district court to consider this new claim. The course chosen by the court of appeals therefore resulted in an expeditious resolution of the issues properly presented on appeal, while providing for an orderly disposition of the conflict of interest claim.

2. During cross-examination, petitioner's counsel asked Harry Williams, a government witness and an employee at petitioner's Fort Walton Beach store, whether he had been told that he would not be prosecuted if he testified for the government; Williams denied that he had been told this (Tr. 40, 56, 58-59). On redirect examination, the government properly elicited from Williams an admission that he had been promised that, as a practical matter, he would not be prosecuted (Tr. 67-68). Cf. *Brady* v. *Maryland*, 373 U.S. 83 (1963). Petitioner contends (Pet. 9-11) that the trial court abused its discretion when it refused to allow counsel to conduct recross-examination of Harry Williams on this issue. The court of appeals correctly concluded (Pet. App. 7), however, that there was no abuse of discretion. Any confusion that might have resulted from Williams' testimony on cross-examination was remedied on redirect examination, and the inconsistent responses given by Williams to the defense and prosecution were before the jury even in the absence of recross-examination. Petitioner has not suggested what more could have been brought out on recross-examination. Moreover, as the court of appeals noted (Pet. App. 7) and petitioner concedes (Pet. 10), petitioner's counsel thoroughly discussed the inconsistent statements during closing argument. As a result, petitioner clearly was not prejudiced by the trial court's refusal to allow recross-examination.

3. Petitioner also contends (Pet. 15-16) that he was deprived of a fair trial because assertedly inflammatory and prejudicial evidence concerning his wife was admitted into evidence. There is no merit to this claim. The government

established that during the investigation leading to the indictment in this case, an agent of the Internal Revenue Service observed to petitioner or his representative that petitioner's standard of living appeared to exceed his reported income for the years under investigation (Tr. 87). Subsequently, petitioner, through a representative, furnished the agent with a statement explaining that the apparently excessive standard of living was due to financial gifts that Coleman Kelly had showered upon petitioner's wife in the belief that she was Kelly's daughter (Tr. 88). The government then established that Kelly had once told another individual, prior to the time petitioner married his wife, that he was planning to marry petitioner's wife (Tr. 144-145).[3] The government introduced this evidence in an attempt to show that a false statement had been made to the government during the investigation. Such evidence plainly was relevant on the issue of willfulness (see *United States* v. *Newman*, 468 F. 2d 791, 794 (5th Cir. 1972), cert. denied, 411 U.S. 905 (1973)) and hence was properly admitted.

4. Petitioner also argues (Pet. 11-14) that he did not receive effective assistance of counsel at trial, in violation of the Sixth Amendment. This argument is without merit.

For example, the record belies petitioner's suggestion (Pet. 13) that counsel did not adequately prepare the case below because he failed to consider whether there was a possible issue under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), with respect to the admissibility of a statement given by petitioner. A consideration of the statement of counsel

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[3]On cross-examination of a defense witness who had testified that Coleman Kelly was giving money to petitioner's wife, the government brought out that the witness thought that petitioner's wife was Kelly's girlfriend (Tr. 242). On cross-examination of petitioner's wife, who testified that Kelly told her that he was her father and gave her money on numerous occasions (Tr. 327, 330-332), the government asked her if she ever dated Kelly (Tr. 353). She denied that she had (*ibid.*).

upon which petitioner relies (Tr. 168) clearly reveals that the statement was prompted not by counsel's lack of awareness of the *Miranda* defense, but rather by his opinion, based on extensive conversations with petitioner, that all statements given by his client had been voluntarily made.[4] In any event, because the statement in issue was given during an interview with an Internal Revenue Service agent at petitioner's store, where he was not in custody or otherwise deprived of his liberty, there would have been no basis for a *Miranda* claim. *Beckwith* v. *United States*, 425 U.S. 341 (1976).[5] The handling of this issue therefore cannot form the basis of a claim of ineffective assistance of counsel.

Petitioner's assertion (Pet. 14) that counsel was negligent in not hiring an expert witness to testify as to matters of accounting or taxation also is without merit. Considering that the evidence conclusively proved that the tax returns were prepared from the corporate books and that the corporate books did not record all of the gross receipts, it is not apparent how an expert witness could have assisted the

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[4]Petitioner omits the italicized portion of the statement by his attorney (Tr. 168):

> *Your Honor, if I had—I've been talking with my client now for quite some time and* if I had any idea from talking to him that there had been a statement involuntarily given or no proper warning I'd have filed a motion to suppress.

The court replied: "I know."

[5]Thus, petitioner's separate argument (Pet. 16-19) that his statement should have been suppressed because he was not properly advised of his *Miranda* rights is without merit. Contrary to petitioner's assertion (Pet. 17), the mere fact that the investigation may have focused on him did not trigger the application of *Miranda*. See *Beckwith* v. *United States*, *supra*. Moreover, *United States* v. *Dickerson*, 413 F. 2d 1111 (7th Cir. 1969), relied upon by petitioner in support of his *Miranda* claim (Pet. 17-19), was expressly repudiated by the Court in *Beckwith*, *supra*, 425 U.S. at 342 & n.2.

defense. Certainly it was within the discretion of trial counsel to avoid the risk that an expert witness might have harmed petitioner more than helped him. Similarly, contrary to petitioner's assertion (Pet. 14), there was no error in counsel's refusal to insist on the presentation of extended argument on his motion for a judgment of acquittal at the close of the government's case. That motion was based on the contention that the evidence was insufficient to support a finding of guilt beyond a reasonable doubt. The court, which obviously had heard the evidence, responded that it would "not require argument" and denied the motion (Tr. 227). Petitioner has not shown how extended argument would have made a difference and has failed, at all events, to establish the insufficiency of the evidence.[6]

Finally, petitioner argues (Pet. 13) that the assistance of his attorney was ineffective because he did not request Jencks Act material in a timely fashion. In the court of appeals, this claim was limited to counsel's failure to obtain

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[6]Petitioner renews his claim (Pet. 19-22) that the evidence was insufficient to support his conviction. This contention is frivolous. As the excerpt from the court of appeals' opinion quoted by petitioner makes clear (see Pet. 19), several witnesses testified that the corporate books for the Pensacola store reflected substantially less money received than they would have if all invoices that were to have been transferred to the Pensacola store had been recorded there, and that income reported on the corporation's tax returns was substantially less than the invoice amount. Petitioner points out (Pet. 20-21) that he offered an alternative explanation of these circumstances and asks this Court to conclude that, by virtue of that explanation, "a reasonable doubt as to the defendant/petitioner's guilt was present." However, the jury was not required to believe petitioner's version of the facts. The role of a reviewing court in this situation is to view the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60 (1942), and to determine if the trier of fact reasonably could conclude that petitioner was guilty beyond a reasonable doubt. Cf. *Jackson* v. *Virginia*, 443 U.S. 307 (1979). In the present case, as the court of appeals observed, "there was more than enough evidence from which the jury could reach that conclusion" (Pet. App. 3).

Jencks Act statements of two government witnesses *before* they testified. See Brief for Appellant at 55. The Jencks Act, 18 U.S.C. 3500, affords no such right, and counsel subsequently received the requested statements (Tr. 102-104). Petitioner now also asserts (Pet. 13, 14) that counsel was ineffective in not having received a Jencks Act statement of prosecution witness Harry Williams until after Williams was excused. This claim was not raised below and should not be considered here. In any event, petitioner has not shown what the statement might have contained, much less how such a statement would have aided his attorney in cross-examining Williams or how he was prejudiced by the failure to request the statement. Especially in these circumstances, there is no occasion for the Court to consider the ineffectiveness claim as it relates to Jencks Act material.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1981